The Central Law Journal.

ST. LOUIS, NOVEMBER 27, 1885.

CURRENT EVENTS.

THE "CO-OPS" REPORTERS.—We have received several numbers of the *New England Reporter*, the *Central Reporter*, and the *Western Reporter*, recently started by the Lawyers Co-Operative Publishing Co., of Rochester, New York. We are very much pleased with the manner in which the reporting is done, and we intend to speak of them more at length at some future time.

THE GEORGIA LAW REPORTER.[1]—This new venture starts out well, and we wish it success. We hope that it will be longer lived than its late predecessor was. It is a hazardous experiment just now to start a local law journal, and if the Wests spread their "reporters" over the whole country, many of the local law journals will not be able to live. The editors are Frank L. Haralson and Charles A. Loring.

LAW AND LYNCH LAW.—The people in some portions of the country are at last getting tired of lynch law, and the lynchers are discovering that there is a "higher law" than lynch law, and a higher court than that presided over by Judge Lynch. Thirty four men charged with the murder of O. T. Culbreath were recently in jail at Columbia, South Carolina, and thirty citizens of Tacoma, Washington Territory, have been indicted by the federal grand jury for expelling the Chinese residents of that place. Those who indulge in such pleasantries will find that if it is not an unsafe, it is at least an expensive pastime.

A LAWYER'S TESTIMONY CONCERNING UNJUST VERDICTS.—In a recent address before the Law Department of the University of Pennsylvania, on Trial by Jury, the Hon. John B. McPherson said: "In my own experience—if I my take the stand—an unjust verdict is the rare exception, and by an unjust verdict I now mean one technically so, one against the decided weight of evidence, or in defiance of the rules laid down by the court. Can any lawyer bear a different testimony?" We answer, yes; we can bear very different testimony. In Missouri, where the issues of fact in actions against railway companies for personal injuries, for killing domestic animals, and for delinquencies as carriers, are put to juries, the rule is almost universal that the verdict goes against the corporation. We cannot recall a single instance to the contrary. The same is true, to a great degree, of verdicts in actions against insurance companies. In Illinois, where the judges do not non-suit freely, as they do in Missouri and New York, we understand that the statistics of trials show that the railroad company gets a verdict in but one case out of two hundred.

CHARGING JURIES.—The difference between a "summing up" according to the English practice and the practice of the Federal courts and a hypothetical written charge read to the jury according to the wretched system which prevails in Missouri is very wide, and receives frequent illustrations of a character to convince any judicious person that the departure from the common law practice was a piece of immeasurable folly and stupidity. Under the old system an able judge almost invariably leads a fairminded jury along to a correct result. We find a happy illustration of this in the charge of Mr. Justice Miller in the case of Garrahy v. Kansas City &c. R. Co.[2] A railway track-repairer had been struck and hurt by a switch engine, in charge of a yard master and hands; and this is the way the learned judge put out of the view of the jury the idea that the company might not be liable on the ground that the plaintiff was a fellow servant with the servants of the company from whose carelessness the injury may have proceeded: "There is a principle of law, that where one

[1] Published by the Georgia Law Reporter Publishing Co., Atlanta, at $5 per year.

[2] 2 Kan. L. J. 220.

man in the employment of another is injured by the carelessness of a third man, who is also employed by the same man, the common employer is not responsible for the carelessness of the one who injured the other. There is that general principle. It is liable to a great many exceptions, such as that they must be in the same common employment. I say to you, and relieve you of all trouble about that, that these men, the plaintiff and the others, were not in the common employment of the railroad company with the party who had charge of the cars that injured the plaintiff; so that it is out of your way." The correctness of this ruling was re-affirmed by the learned judge after reargument upon motion for a new trial, and he took occasion to use the following language: "And this, my personal judgment as a matter of sound principle, is also the necessary result of the latest decision of the Supreme Court of the United States on the same subject, in the case of the Chicago, Milwaukee & St. Paul Railway Co. v. Ross.[3] The length of time that case was held under consideration by the court, and the ultimate dissent of several of its members, show the serious attention it received, and by it I am governed."

AN ENGLISH VIEW OF THE POINTS IN RIEL'S CASE.—American lawyers will read with interest the following view of the points in Riel's case. Nothing could throw into stronger light the difference between the British and the American constitution. The difference is about this: In England the legislature is omnipotent; but in America it would be omnipotent if it were not for the judiciary. The judiciary in this county is a sort of a ball and chain fastened to the legislative leg. If General Lee had been tried for treason and murder and convicted, under a statute similar to the Canadian statute which governed the trial of Riel, by two justices of the peace and a jury of six men, it can scarcely be doubted that the Supreme Court of the United States would have gotten possession of the record and of the prisoner by its writs of *certiorari* and *habeas corpus*, and would have held the statute unconstitutional and the conviction void. They would undoubtedly have held that a trial of such a crime by a jury of six men is not a trial by jury as it existed at common law, and hence does not answer the mandate of the Constitution of the United States that "the right of trial by jury shall remain inviolate." We can equally well understand why an English lawyer should regard such points as mere quibbles, when viewed from the British standpoint of parliamentary omnipotence. Indeed, it would really seem as though Riel's lawyers must have received a part of their legal education on this side of the St. Lawrence. *The Law Journal* (London), says of Riel's case:, "Quibbling for a man's life is justifiable if it be ever justifiable; but it was not to be expected that the strong bench of judges representing the Judicial Committee of the Privy Council at the hearing of the petition in the case of Regina v. Riel would accept the quibbles put forward in behalf of the condemned man. If it be true that the Dominion Parliament, under powers from the Imperial Parliament to 'legislate for the due administration and the peace, order, and good government of Her Majesty's subjects in the North-West Territories,' cannot put a jury of six in place of a jury of twelve and allow six challenges instead of thirty-five, it is difficult to see what that legislature can do. Experience in the county courts of England shows that twelve jurymen are the smallest number from which impartiality and common sense can reasonably be expected; but the Dominion Parliament was allowed its own opinion on such subjects, and it has altered the English common law accordingly, probably to the necessities of a sparsely-populated country. To say that of a particular alteration of the existing law when made that it is *ultra vires* because it does not in fact conduce to good order and government, is to revoke the legislative powers conferred. The stipendiary magistrate presiding at the trial was required to have 'full notes of the evidence' taken down 'in writing,' which was done in shorthand. If shorthand is not writing, what is it? In the middle ages it would, perhaps, have been called magic, but in these prosaic times it is writing. It is curious but unnecessary to observe that the Act happens to use a phrase peculiarly appropriate to shorthand —namely, 'a full note,' which is the technical

[3] 112 U. S. 377.

expression for a verbatim shorthand note. No other result than the rejection of the petition could follow, without prejudice, as we are glad to see, to the question of the right of appeal to the Privy Council in criminal cases generally."

NOTES OF RECENT DECISIONS.

NEW TRIALS. [MISCONDUCT OF COUNSEL.]—ABUSES OF PRIVILEGE OF COUNSEL IN ARGUING TO THE JURY.—What misconduct of counsel before the jury on the trial of a cause at law will be ground for a new trial, and the manner in which such a matter may be saved for review in an appellate court, have become of late questions of frequent adjudication. As to the mode of saving such a question for review on appeal or writ of error, we believe that the sound rule was laid down by Reese, J., of the Supreme Court of Nebraska, in *Bradshaw v. State*,[4] in the following language: "The Supreme Court, in the exercise of its appellate jurisdiction in cases of this kind, is limited to the correction of the error of the district court. Before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this State is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language, and a ruling upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted. By a bill of exceptions, showing the language used, the objection, ruling of the court, and exception to the ruling can be presented to this court for decision. If the court sustains the objection, and thus condemns the language, and requires the attorney to desist and confine himself to the evidence in the case, no injury is suffered by the accused." This ruling has been reaffirmed by the same court in a more recent case.[5] It has been held that an irregularity of this kind cannot be shown to the appellate court by affidavits filed in support of a motion for new trial.[6] The reason is, that whatever takes place during the trial in the presence of the judge, not shown by the record proper, is matter of exception, and must, in order to be noticed by a reviewing court, be certified to it by the judge of the trial court in a bill of exceptions. From this it follows that such an error is not saved for review unless the attention of the judge presiding at the trial was called to the misconduct of the counsel at the time when it took place.[7] Nor will such objections avail when made for the first time in an appellate court;[8] nor unless the trial judge upon his attention being called to it, failed or refused to administer the proper rebuke or correction. Where this is done, no ground is afforded for a new trial.[9]

The courts, however, grant new trials, both in civil and criminal cases, where counsel abuse their privileges by persisting in stating to the jury facts which are not in evidence, or by making other statements in the way of argument which are clearly unwarranted and prejudicial.[10] The rule is more strongly upheld in cases involving life, than in cases involving property merely.[11] But the courts in those cases extend considerable indulgence to the privileges of advocacy, and do not grant new trials on account of mere rhetoric, declamation or exaggeration. They obviously will not reverse because counsel in argument give an erroneous opinion as to what the evidence proves.[12] Where it appeared in evi-

[4] 22 N. W. Repr., 361.

[5] McLain v. State, 24 N. W. Repr. 720, 724.

[6] Roeder v. Studt, 12 Mo. App. 566. It seems at one time to have been the practice in Missouri to raise this question by affidavits; for in some cases the courts have refused to reverse the judgment for this cause because the affidavits were conflicting. State v. Baber, 11 Mo. App. 586; State v. Johnson, 76 Mo. 121.

[7] State v. Degonia, 69 Mo. 486; Barbour v. McKee, 7 Mo. App. 587.

[8] State v. Pollard, 14 Mo. App. 583.

[9] State v. Lee, 66 Mo. 165; State v. Degonia, 69 Mo. 486; State v. Shorn, 12 Mo. App. 590; State v. Emory, 12 Mo. App. 593; s. c., affirmed, 79 Mo. 461; State v. Dickson, 78 Mo. 438; State v. Zumbunson, cited in 79 Mo. 463; State, *ex rel.* v. Stark, 10 Mo. App. 591; Goldman v. Wolff, 6 Mo. App. 491; Klosterman v. Germania Life Ins. Co., 6 Mo. App. 582. Compare State v. Kring, 64 Mo. 591, 595.

[10] State v. Lee, 66 Mo. 165; State v. Kring, 64 Mo. 591. See observations on the same point in the latter case in an intermediate appellate court. State v. Kring, 1 Mo. App. 438.

[11] State v. Kring, 64 Mo. 591 (modifying the remarks of the same court in Lloyd v. Hannibal, etc. R. Co., 53 Mo. 509, 514).

[12] State v. Mallon, 75 Mo. 355.

dence that after the prisoner had committed the assault charged in the indictment, he had gone to the Indian Territory, the court refused to grant a new trial because the prosecuting attorney, in his argument to the jury, said that "the defendant had gone to the Indian Territory where all rascals go." [13] Nor are mere tricks of advocacy devised to arrest the attention of the jury at certain points in the evidence, ground for a new trial.[14] Thus, where a witness was being examined in a criminal case, and the prosecuting attorney at a point in the evidence remarked to his associate, "Put that down," an objection to this language was held frivolous.[15] So, where in his argument on the trial of an indictment for resisting an officer, the prosecuting attorney said, "Malice may bud and bloom in a man's heart almost in a moment, or in a short time," the court saw nothing in this which could have operated to the injury of the defendant.[16] Nor will a judgment be reversed even in a capital case, because of indiscreet side-bar remarks by the prosecuting attorney, unless the court can see that a jury of ordinarily intelligent men would be misled or prejudiced by them.[17] Nor in a capital case, where counsel for the defendant has allowed improper evidence to go to the jury without objection, can a new trial be claimed on the ground that the prosecuting attorney commented on such evidence in his argument to the jury.[18] The admission by the court of irrelevant evidence is, of course, not always ground for reversing the judgment; since the evidence may have had no bearing either way, or may not have been prejudicial to the unsuccessful party. By parity of reasoning, the fact that counsel in addressing the jury is improperly allowed to read to them documentary evidence of an irrelevant character, will not require a reversal unless prejudice appear.[19] So, where a case had been fairly tried and decided in favor of the proper party on its merits, the court declined to reverse the judgment merely because the successful counsel in his argument had improperly read to the jury the style and number in another case endorsed upon the writ which had issued therein.[20] Neither was it error to refuse a new trial in a criminal case because the prosecuting attorney made a statement to the jury of a proposition of law which, although erroneous, could have no bearing on the question of guilt or innocence of the accused, and hence no effect on their verdict; [21] nor because the prosecuting attorney had stated in the presence of the jury that a certain witness examined on the preceding day and recalled, had been arrested because he had stated after leaving the stand that his testimony was false.[22]

On the contrary, where the court failed to instruct the jury upon a material point, and the prosecuting attorney in his closing argument took it upon himself to supply the omission, and, in so doing, stated the law in a manner prejudicial to the prisoner, the judgment was reversed.[23] So, where in his closing argument to the jury the prosecuting attorney told them that where the charge was murder in the first degree, the defense of insanity admitted that the charge was proved, and the court refused on the defendant's motion to require him to withdraw the remark, it was held that this was error for which the judgment must be reversed.[24] It has been held that a statement made by counsel in his closing argument to the jury in a civil case of the fact that at a former trial there had been a verdict in favor of his client, would afford ground for a new trial, unless under exceptional circumstances.[25] For the prosecuting attorney in a criminal case to use the following words in addressing the jury has been held ground for a new trial under the statute of Missouri forbidding the prosecuting attorney from commenting on the fact of the prisoner failing to testify in his own behalf,[26] although the court rebuked the attorney, and he apologized at the time: "If the defendant is the innocent man those gentlemen would have you think he is, why did they

[13] State v. Stark, 72 Mo. 37.
[14] Haderlein v. St. Louis R. Co., 3 Mo. App. 601.
[15] State v. Hopper, 71 Mo. 426, 433.
[16] State v. Estes, 70 Mo. 428.
[17] State v. Guy, 69 Mo. 430.
[18] State v. Banks, 10 Mo. App. 111, 115.
[19] City of St. Louis v. Fruin, 9 Mo. App. 590.
[20] Union Savings Association v. Clayton, 6 Mo. App. 588.
[21] State v. Dibble, 6 Mo. App. 584.
[22] State v. Lewis, 6 Mo. App. 584.
[23] State v. Reed, 71 Mo. 200.
[24] State v. Erb, 9 Mo. App. 588.
[25] Crahan v. Balmer's Executor, 7 Mo. App. 585.
[26] Mo. R. S., § 1919.

not put him upon the stand to testify?" [27] But the statement by the prosecuting attorney in his argument to the jury, "that no attempt had been made by the defendant to explain his possession of the property," was not regarded by the reviewing court as referring to the fact that the defendant might have been examined as a witness if he had so chosen, and was therefore held not a ground for new trial.[28]

The foregoing decisions point strongly to the propriety and necessity of the presiding judge remaining on the bench during the argument of the cause to the jury. Under the Missouri practice, the judge delivers his instructions to the jury in writing, and thereafter the counsel deliver their argument. The judges of the Circuit Court of the City of St. Louis had at one time the slip-shod practice of retiring from the bench after instructing the jury and going to lunch, or attending to other business, sometimes calling upon a member of the bar to preside, and sometimes leaving the judicial seat entirely vacant. Of course, this was always done with the "consent" of the counsel engaged in the cause, express or implied, and of course counsel would never object to an arrangement proposed by the presiding judge for his own convenience. But it came to pass that, during this absence of the judge, counsel would sometimes abuse their privilege as advocates, and would even argue against the law as delivered from the bench. The St. Louis Court of Appeals put a stop to this practice in two decisions, holding that the consent of a party to such an arrangement is no waiver of his right to have his argument conducted before the presiding judge, and that improper remarks, or the reading of improper documents to the jury during such an absence of the judge, will be ground for granting a new trial unless no prejudice clearly appears.[29]

It ought to be added that in all cases where a new trial is claimed in an appellate court, much deference is paid to the ruling of the question by the court below, whose presiding judge was in a much better position to know whether prejudice really accrued to the unsuccessful party, than the appellate court is.[30]

[27] State v. Brownfield, 15 Mo. App. 593.

[28] State v. Preston, 77 Mo. 294.

[29] Brownlee v. Hewitt, 1 Mo. App. 360; State v. Claudius, Id. 551.

NEGLIGENCE. [MASTER AND SERVANT—BURDEN OF PROOF.]—LIABILITY OF MASTER TO SERVANT FOR INJURY HAPPENING THROUGH NEGLIGENCE OF FELLOW SERVANT.—Nothing suits the profession better than to have a court of last resort enunciate distinct rules by which they can be guided in advising their clients. Nothing is more unsatisfactory than the habit which some appellate judges have of shuffling and slobbering, and shirking the responsibility of enunciating distinct principles. We have a pleasant instance of the former and better way in the opinion given by the Supreme Court of Illinois, through Scholfield, J., in *Stafford v. Chicago, etc. R. Co.*,[31] where it is said: "We are firmly committed to the principles: (1) Where one servant is injured by the negligence of his fellow-servants, the duties of both being such as to bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution, and the master is guilty of no negligence in the employment of the servant causing the injury, the master will not be liable for the injury.[32] (2) If it be alleged the master is guilty of negligence in selecting or retaining an incompetent servant, the burden is on the plaintiff to prove it.[33] (3) If a person knowing the hazards of his employment, as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master." [34] The distinct enunciation, by the courts of last resort, after careful consideration, of legal rules, is the first and most essential step in the codification of the common law; and the above is as good an illustration of three sections of a code of the common law under the title of Negligence as we know of.

[30] See the remarks upon this point in Lloyd v. Hannibal, etc. R. Co., 53 Mo. 509, 514.

[31] 2 Northeastern Repr. 185.

[32] Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302; Chicago & E. I. R. Co. v. Geary, 110 Ill. 383.

[33] Columbus C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545; Chicago & E. I. R. Co. v. Geary, *supra*.

[34] Simmons v. Chicago & T. R. Co., 11 Bradw. 147; Abend v. Terre Haute & I. R. Co., 111 Ill. 202; Missouri Furnace Co. v. Abend, 107 Ill. 44; Pennsylvania Co. v. Lynch, 90 Ill. 334.

JURISDICTION. [TITLE TO LAND.]—INJURY TO TENEMENT.—In *Burlington, etc. R. Co. v. Brush*,[35] the question was whether an averment in an action on the case for negligence, brought before a justice of the peace, that the plaintiff had been damaged both in his cellar and tenement, and in his drugs and medicines, in his said cellar, etc., by reason of the negligence complained of, stated a case where title to land was concerned, of which justices of the peace had not jurisdiction. The court held that it did. No reasons for the ruling are stated in the opinion, but it seems to have followed certain precedents in that State. In one of these cases the declaration averred that the defendant had erected a fence "so near the dwelling house of the plaintiff that his lights were obstructed, etc., and this was treated as a sufficient indication that title to land was concerned. This conclusion seems to be predicated upon the idea that the plaintiff cannot recover damages for the injury to the tenement without proving *some sort* of title thereto.[36] But this would seem to be unsound. Title to land would not be directly concerned unless the suit were brought for the recovery of the title, or to divest title out of one party and vest it in another. In an action for trespass upon realty, title would clearly not be concerned, unless the plaintiff should aver title and the defendant should traverse this allegation. Notwithstanding the Vermont cases, we believe that the weight of authority is decidedly in favor of the proposition that an action to recover damages for an injury to a freehold does not involve title to real estate.[37]

[35] 57 Vt. 472 (advance sheets).

[36] See Jakeway v. Barrett, 38 Vt. 328; Haven v. Needham, 20 Vt. 183; Ballor v. Burr, 1 Vt. 488.

[37] C. B. & Q. R. Co. v. Watson, 105 Ill. 217; Hale v. Penn's Heirs, 25 Gratt. 261, 267; State, *ex rel.* v. Court of Appeals, 67 Mo. 200; Skrainka v. Allen, 2 Mo. App. 387; Robertson v. Springfield, etc. R. Co., No. 3243, St. Louis Court of Appeals.

LIBEL—PRIVILEGED PUBLICATIONS, LEGISLATIVE AND JUDICIAL.

a. Introductory.
b. Publication of the proceedings of legislative bodies—how far privileged.
c. Publications of legislative proceedings which are actionable.
d. Publications of judicial proceedings—how far privileged.
e. Privileged communications of counsel.

a. Introductory.—That no law shall be made abridging the freedom of speech or of the press, is a fundamental principle of American institutions as well as of those of the the mother country. It is incorporated into the Constitution of the United States and the organic law of each of the several States, and is universally regarded as a most precious safeguard of popular liberty. It is clearly the duty of all courts scrupulously to respect it, and to proceed with the utmost circumspection in all cases in which by any chance it may be subjected to peril or detriment.

It is no less the duty of the courts to exert the full strength of the law in behalf of those who have been injured in their feelings, estate, or reputation by the abuse of this much cherished privilege. The libeller deserves most exemplary punishment, and it is the duty of the court to award it in all criminal prosecutions, and in civil actions for damages, to see that he who has suffered from the pestilent pen of the libeller obtains full redress for his grievances.

There are utterances however, oral and printed, which, although they may be in fact false and malicious, are so far privileged that no inquiry into the motiyes of the author is permitted by the law. Among these are the proceedings of legislative bodies, and those of courts of justice. Whatever is said or done or printed in the due or legal course of legislative or judicial action is exempted from re-examination in prosecutions or actions for libel. And it is to the consideration of these privileges and exemptions, their extent and limitations, that this article is devoted.

b. Publication of the proceedings of legislative bodies—how far privileged.—Until a comparatively modern period the proceedings of the English Parliament were secret, both houses sat with closed doors; and in Ameriea so did the constitutional convention of 1787

and the United States Senate in the earliest days of the Republic.[1] All this however has been changed within less than a hundred years past. Publicity is now the rule and secrecy the exception. Legislative bodies rarely sit with closed doors, and it is only in the committee rooms that even the semblance or pretence of secrecy is to be found. Whatever of the slightest public interest occurs in the open session of the house or in the private consultations of committees is promptly spread before the public, either by the official report, or the enterprise of the ubiquitous interviewer. So far as the former is concerned, no question of the abuse of the liberty of speech, or the freedom of the press can possibly arise. It is too thoroughly settled to admit of any controversy, that whatever a legislator may say in his place in the house, or in the committee room in the discharge of his duties is privileged and cannot be drawn into question in a court of justice. In any event he is secure from a civil or criminal proceeding provided that what he says or does appears to be in discharge of his duty as a member of the legislative body.

In England even within the present century the law was otherwise, for a member of parliament was convicted upon an indictment for libel in publishing a report of his speech made by him in his place in parliament.[2]

c. Publications of legislative proceedings which are actionable.—There are some cases however in which proceedings which in one sense are legislative have been held to be without privilege and their publication actionable. Of this description is a recent and very notable case in Texas which has excited much comment in legal circles as well as among those who are without the pale of the legal fraternity. The circumstances are peculiar, and the rulings of the court have been much criticised. The Texas legislature appointed a joint committee, vested it with the usual powers, and instructed it to investigate certain alleged frauds and forgeries; to take testimony and furnish the fruits of its labors to the Attorney-General to be used by him at his discretion in prosecutions for the frauds and forgeries that were supposed to have been perpetrated. The committee performed its duty, but acted *ex parte* and sat with closed doors. No notice was given to the parties implicated, nor were they expected to appear and make any defense. The testimony so taken by the committee was turned over to the Attorney-General and when that was done the connection with it of the committee ceased altogether. It was what is sometimes, very discourteously, called a "smelling committee," doing detective work in aid of the prosecuting officer of the State. The reporter of a too enterprising newspaper obtained through the excessive courtesy of the Attorney-General, access to this mass of testimony and transcribed it for his employers, who straightway published the whole of it. This publication was the alleged libel. A person who was in that testimony falsely accused of fraud and forgery brought suit against the newspaper, and recovered heavy damages; upon appeal the supreme court affirmed the judgment.

There was a preliminary question relating to the jurisdiction of the trial court, which deserves some notice. The defendants were sued in a county other than that of their residence. This was done under a statute of Texas by which it is enacted that: "where the foundation of the suit is some crime, offence, or trespass for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime, offence or trespass was committed, or in the county where the defendant has his domicile."[3] As libel is declared by the criminal code of Texas to be an offence punishable by fine or imprisonment,[4] the court ruled that the plaintiff alleging in his petition that the foundation of his action was a libel, might well sue in any county in which the libel was published. And in so ruling the court was perfectly right. The plaintiff's petition declared upon the libel as defined by the statute of Texas and a plea to the jurisdiction adding a denial of committing the statutory offence of libel, denying malice and intent to injure, would have been bad as amounting to the general issue. Under his petition the plaintiff was bound to prove

[1] Cooley Const. Lim. p. 420.
[2] Rex v. Creevy, 1 Maule & S. 273.
[3] R. S. Tex. Art. 1198, § 8.
[4] Crim. Code Tex. Art. 617.

publication in the county he had selected, and that the publication was a statutory libel.

Upon the principal question in the case, whether or not the publication of the testimony was privileged, the court very correctly held that, "to be privileged the proceeding must have been not only judicial or legislative, but it must not have been preliminary, *ex parte*, and secretly conducted." (Citing,) "Flood on libel, 244; Townshend on Libel, § 231; McCabe v. Cauldwell, 18 Abb. Pr. 377; McBee v. Fulton, 47 Md. 403. There may be cases where a preliminary and *ex parte* proceeding would be privileged; * * * but when to these two conditions is added the fact that the proceeding is conducted in secret * * no principle of the law of libel will protect its publication." The court adds that the committee in question possessed neither judicial nor *quasi* judicial powers. It determined nothing, exercised its judgment upon no question requiring judicial action; did not even procure evidence admissible in a court of justice. The testimony could be of no use except as "pointers" for the prosecuting attorneys.

The court further held that the proceedings of the committee was hardly legislative in any proper sense of the term. The committee was not to do anything in aid of legislation, was not to report anything for legislative action, its duties might as well have been assigned to any other persons, the result of its labors was not necessarily to come to the knowledge of the legislature nor to form a part of its records.

The court might well have added that even if any dignity or sanctity attached to this testimony during its incubation and while in the hands of the committee, it was denuded of such dignity, and its appertaining privileges when it was transferred to the attorney general. It then became a body of official memoranda, to be used or not at his discretion in the contemplated prosecutions.[5]

The opinion of the court in this case is very able, and the conclusion reached is clearly correct. No public interest required the publication of the obnoxious matter, no official was authorized by law to order or permit it, on the contrary its publication was against the interest of the State. The testimony itself was neither a legislative nor a judicial record, and its publication, as the court very properly held, was neither required nor warranted by any public exigency.

This case seems to be of the first impression so far as it discriminates between the legislative and *quasi* judicial action of a legislative body, and such action of that body as is neither legislative nor judicial. In a Louisiana case the action was brought against a witness who testified before a Congressional committee, and a newspaper which published without comment the evidences which he gave. It was held that the witness was not liable for slander because he was a witness, bound to tell all he knew and privileged on principles of public policy. As to the newspaper the court said: "The privilege of the press has not been abused. They have simply published without comment the evidence taken by an investigating committee of Congress, which we deem to be in every respect lawful."[6] As in this case it does not appear that the point was made by the plaintiff that the proceeding was *ex parte*, or conducted in secret, or that the committee was not to report to Congress, the distinction between this and the Texas case is manifest.[7]

(*d*). *Publications of Judicial Proceedings—how far Privileged.*—In judicial proceedings, public policy requires that there shall be the most perfect freedom from all apprehension of outside interference. Hence a judge cannot be held civilly responsible for his judicial action, nor, if his duty requires him to make a written or printed publication, can he be held liable criminally for a libel. A witness cannot be made responsible in a civil action for defamatory statements in his testimony, no matter how false, nor how offensive they may be.[8] There is, however, this limitation to the privilege of slandering on the witness stand, that the witness must believe that the answers which he makes to the questions propounded to him are pertinent and relevant. "If he uses the words complained of for the mere purpose of defaming the plaintiff, the

[5] Belo v. Wren, 63 Tex. 695.

[6] Terry v. Fellows, 21 La. Ann. 375.

[7] See also Kane v. Mulvany, 2 Irish Rep. 402.

[8] Terry v. Fellows, 21 La. Ann. 375; Marsh v. Ellsworth, 50 N. Y. 305; White v. Carroll, 42 N. Y. 161.

law withdraws the protection it would otherwise have afforded him."[9] The rule on this subject is well stated in a Wisconsin case: "He is not answerable for any statements he may make which are responsive to questions put to him, and which are not objected to and ruled out by the court, or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal, etc."[10]

The privilege of a juror to say what he pleases in the jury room to his fellow jurors about the parties or the witnesses in the cause is absolute and complete.[11]

The grand jury is also privileged in this respect, but its privilege is limited to its official communications to the court. In general a grand jury can only officially speak to the court in an indictment or a presentment, and any other report it may make has no privilege, and its members may be held responsible for libel, if malice and falsehood and the other essentials to a successful charge of that character can be proved. If, however, a grand jury in a "report" charge an officer with fraud, believing the charge to be true, and that it is their duty to make it, they are not liable for a libel.[12] In such a case malice, the most essential element of slander or libel, is manifestly wanting.

The publication of judicial proceedings, although otherwise perfectly legitimate, becomes illegal and libellous if the publication is accompanied with defamatory comments. The comments being libellous they infect the legitimate portion of the publication and destroy its privilege.[13] It is very obvious that the libel in such case is wholly in the comment, which would have been equally actionable if it had been published alone without any recital of the judicial proceedings.

In New York it was found necessary to decide that "the last scene of all" in a very grave judicial proceeding, *i. e.*, the scaffold, was not privileged at all, and that a newspaper publication of the hanging of a criminal might well be a libel on the living. The culprit thought it appropriate in his "last dying speech and confession" to criticise severely the professional conduct of his counsel, and the newspaper having faithfully reproduced the parting salutations of the moribund criminal, was sued for libel by the outraged lawyer. There was a judgment in his favor against the newspaper which was affirmed upon appeal.[14] Such a case is clearly without the reason of the rule which confers the privilege of free publication of judicial proceedings. The purpose of the rule is to facilitate the administration of justice, and in the case cited, justice had done its utmost before the publication was made.

The grade or dignity of a court is no element in the solution of the question whether its proceedings may be lawfully published. In a Maryland case it was held that the proceedings before a justice in a preliminary examination on a charge of misdemeanor was, in a qualified sense privileged, and that a newspaper was not liable to an action for publishing a report of such a trial, if its report was substantially correct, not garbled or partial, and without malice. Such a proceeding is held to be that of a public court of justice, whether the defendant makes his defense, or by reserving it renders the trial purely *ex parte*.[15] In this connection it may be remarked that the privilege does not belong to any *ex parte* proceedings, except those which are rendered such by the choice of the defendant. It is at the option of a defendant whether he will fight his battle on the skirmish line of a committing trial, or reserve his substantial defense to meet the charges made by the indictment.

In a recent Massachusetts case it was held that the publication of a petition to disbar an attorney, filed in court, but not acted upon before the publication is not privileged. The publication of pleadings and other legal documents stand upon a different footing from the report of a trial of a cause in open court. The rule laid down in this case, is that the

[9] White v. Carroll, *supra*; Barnes v. McCrate, 32 Me. 442; Kidder v. Parkhurst, 3 Allen, 393.

[10] Calkins v. Sumner, 13 Wis. 193; see also Nix v. Caldwell, 81 Ky. 297.

[11] Dunham v. Powers, 42 Vt. 1.

[12] Rector v. Smith, 11 Iowa, 302; see also Bradley v. Heath, 12 Pick. 162.

[13] Commonwealth v. Blanding, 3 Pick. 304, 318; Thomas v. Croswell, 7 Johns. 264; Clark v. Binney, 2 Pick, 113, 117; Flint v. Pike, 4 Barn. & Cr. 473; Roberts v. Brown, 10 Bingh. 519; Heyward v. Cuthbert, 4 McCord, 354.

[14] Sanford v. Bennett, 24 N. Y. 20.

[15] McBee v. Fulton, 47 Md. 403.

publication to be privileged must not be partial and *ex parte* but must include the whole proceeding, although it is permissible to publish in successive numbers of the journal. The right to inspect and take copies of court papers, does not include the right to publish those papers.[16]

In England the publication of a bill or answer in chancery, or indeed of the whole record before the case has been heard, is a contempt of court and of course not privileged.[17]

And if in a publication of judicial proceedings otherwise privileged appear also other statements not privileged, an action may be sustained upon the latter.[18]

(*e*). *Privileged communications of counsel.*—Counsel have the right to speak freely of the conduct of the parties to the action, the witnesses in the cause and all others connected with the matter, but he must not "wander designedly from the point, and maliciously heap slander upon his adversary," or anybody else, for that matter.[19] Nor is he permitted to insert irrelevant and injurious matter in the pleadings in a cause, if he does so his privilege will not protect him.[20] But if he sticks to the point in issue, he can speak very freely. Ch. J. Shaw says: "Great latitude of remark and observation is properly allowed to all persons, both parties and counsel in the conduct and management of all proceedings in the course of administration of justice * * * they are only restrained by this rule, viz., that they (their remarks) shall be made in good faith, to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice."[21] This limitation is in the same case expressed by the same eminent jurist thus: "That a party or counsel shall not avail himself of his situation, to gratify private malice by uttering slanderous expressions, either against a party witness or third person, which have no relation to the cause or subject matter of the inquiry."[22] It is, however, slander for a party or his counsel to say to a witness under examination in a court, "that is a lie."[23] Such unvarnished comment besides being an abuse of the privilege of free speech is a contempt of court, because the language is "unparliamentary," and because it is spoken out of due season.

And if the report of a counsel's remarks contains intrinsic evidence that it was not published with good motives, and for justifiable ends it is not privileged. Thus where the whole report consisted after two or three introductory sentences, of a violent, angry, and defamatory speech by one of the parties to the cause acting as his own counsel, it was held that the publication was not privileged, and judgment for very heavy damages was rendered against the publisher.[24]

Counsel and parties who are acting as their own counsel, are said to have as broad a privilege of speech as members of legislative bodies. If they say nothing that is not pertinent and relevant to the question before the court their motives cannot be questioned in an action of slander.[25] And if an attorney without the directions of his client, introduces into legal proceedings defamatory matter, the client cannot be held liable.[26]

Although a lawyer may have as full a right to speak freely within the limitations already alluded to as the legislator, there is nevertheless a material difference between the right to publish matter otherwise defamatory, which is originally produced in a legislative body, from that which first appears in a court of justice. The reason of the privilege of free

[16] Cowley v. Pulsifer, 137 Mass. 392; see also Lake v. King, 1 Saund. 120, 133; Weston v. Dobniet, Croke Jac. 432; Rex v. Creevy, 1 Maule & S. 273; McGregor v. Thwaites, 3 Barn. & C., 24, 31, 35; Flint v. Pike, 4 Barn. & C., 473, 481; Commonwealth v. Blanding, 3 Pick. 304; Rex v. Wright, 8 Term, 293; Wason v. Walter, L. R. 4 Q. B. 73; Stockdale v. Hansard, 9 Ad. & El. 1, 212; Lewis v. Levy, Ellis, B. & El. 537; Sanford v. Bennett, 24 N. Y. 20; Burrows v. Bell, 7 Gray, 301; Barber v. St. Louis Despatch Co., 3 Mo. App. 377.

[17] *In re* Cheltenham etc. Co., Law Rep. 8 Eq. 580; Tichborn v. Mostyn, Law Rep. 7 Eq. 55 *note*.

[18] Buthrick v. Detroit etc. Co., 50 Mich. 629, 644; Miner v. Detroit etc. Co., 49 Mich. 358.

[19] McMillan v. Birch, 1 Binney, 178.

[20] McLaughlin v. Cowley, 127 Mass. 316.

[21] Hoar v. Wood, 3 Metc. (Mass.) 193.

[22] Hoar v. Wood, *supra*; King v. Wheeler, 7 Cowan, 725; Hastings v. Lusk, 22 Wend. 410.

[23] Mower v. Watson, 11 Vt. 536; Kean v. McLaughlin, 2 Serg. & R. 469; McClaughey v. Wetmore, 6 Johns, 82.

[24] Saunders v. Baxter, 6 Heisk (Tenn.) 369.

[25] Hastings v. Lusk, 22 Wend. 410, 417; Hodgson v. Scarlett, 1 Barn. & Ald. 232; Ring v. Wheeler, 7 Cowan, 725; Warner v. Paine, 2 Sandf. 195; Garr v. Selden, 4 N. Y. 91; Marsh v. Ellsworth, 50 N. Y. 309; Spaids v. Barrett, 57 Ill. 289.

[26] Hardin v. Comstock, 2 A. K. Mars., 480.

publication is the same in both cases; that important public business may be freely transacted by the proper persons without apprehension of personal consequences. The legislator having delivered his speech in the house, may freely publish it, however defamatory it may be, because his is a continuous duty and a continuous responsibility. He must answer to his constituents, to the State, or the nation. The lawyer, having delivered his speech, has no right to publish it, except at his peril, if there should be libellous matter in it. When there is a verdict and a judgment, the lips of the counsel are sealed. If he repeats orally anything defamatory which he has said in his speech, he is responsible in an action for slander, if he publishes it he may be held to answer either a criminal charge or a civil action for libel. The lawsuit being ended, the lawyer is denuded of his privilege, and reduced to the ranks as a private citizen.[27]

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St. Louis, Mo.

[27] Flint v. Pike, 4 Barn. & Cr. 473.

COVENANTS RUNNING WITH THE LAND.

NORCROSS v. JAMES.

Supreme Judicial Court of Massachusetts, October 23, 1885.

COVENANTS. [*Running with Land*]. *Covenant not to Work Quarry does not Run with Land.*—The following covenant in a deed of conveyance does not run with the land, and does not bind the heirs and assigns of the covenantor: "That I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Long Meadow."

This was a bill in equity to restrain the defendants for the breach of a covenant in a deed from one Luke Kibbe, Jun., to William N. Flynt. The case was reported to the full bench of the Supreme Court, on an agreed statement of facts, in which it appeared that one of the inducements of the purchase of the estate was the valuable quarry of marble it contained, and the covenant the deed contained restraining the quarrying of marble on the adjoining land. The plaintiff contended that the covenant was one that run with the land, and as such, was binding on the heirs and assigns of the covenantor, in favor of the heirs and assigns of the covenantee. The defendant contended that it was personal, and that it was also void, as being in restraint of trade. The material facts appear in the opinion.

James G. Dunning for the plaintiff; *Charles L. Long* for the defendant.

HOLMES, J., delivered the opinion of the court:

One Kibbe conveyed to one Flynt a valuable quarry of six acres bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seized in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Long Meadow." By mesne conveyances the plaintiffs have become possessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land like that quarried by the plaintiffs; and the plaintiffs bring their bill for an injunction.

The discussion of the question under what circumstances a land-owner is entitled to rights created by way of covenant with a former owner of the land, has been much confused since the time of Lord Coke, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land and those which are said to be attached to the land itself.

"So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land," Chudleigh's case, 1 Rep. 122b; s. c. Popham, 70, 71.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question, How an assignee could sue upon a contract to which he was not a party. West. Symboleog. I., § 35; Wingate's Maxims, 44, pl. 20, 55 pl. 10; Co.-Litt., 117a; Sir Moyle Finch's Case, 4 Inst. 85. But an heir could sue upon a warranty of his ancestor, because for that purpose he was *eadem persona cum antecessore*." See Y. B. 20 & 21 Ed. I. 232 (Rolls ed.); Oates v. Frith, Hob. 130; Bain v. Cooper, 1 Dowl. Pr. Cas. s. c., 11, 14. And the conception was gradually extended in a qualified way to assigns where they were mentioned in the deed; Bract. fol. 17 b; 67a, 380b, 381; Fleta. III. chap. 14, § 6; 1 Britton (Nich.) 255, 256; Y. B. 20, Ed. I. 232-234 (Rolls ed.); Fitz Abr. Covenant, pl. 28; Fin. Abr. Voucher N, p. 59; Y. B. 14 H. 4 56; 20 H. 6. 34b; Old Natura Brevium, Covenant. 67, B, C, in Rastell's Law Tracts ed. 1534; Dr. and Student, I., chap. 8; T. N. B. 145 5; Co.-Litt, 384b; Com. Dig. Covenant, B 3; Middlemore v. Goodale, Cro. Car. 503; s. c., ib. 505, W. Jones, 406; Philpot v. Hoare, 2 Atk. 219. But in order that an assignee should be so far identified in law with the original covenantee, he ust have the

same estate, that is, the same status or inheritance, and thus the same *persona quoad* the contract. But as will be seen, the privity of estate which is thus required, is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. See further, Y. B. 21 & 22 Ed. I. 148 (Rolle's ed.); 14 Hen. 4, pl. 5. Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. F. N. B. 134 E. We may add that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir as representing the person of his ancestor. Y. B., 32 & 33 Edw. I. 516 (Rolls ed.).

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor, abator, intrudor, or the lord by escheat, etc., shall have them as things annexed to the land." Chudleigh's case, *ubi supra*. See 1 Britton, (Nichols' Ed.) 361; Keilway, 145, 146, pl. 15; F. N. B. 180 n; Sir H. Nevil's case, Plowden, 377, 381. In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and of course there was no need to mention assigns. See cases *supra et infra*. The phrase consecrated to cases where privity was not necessary was *transit terra cum onere*. Bract. fol. 382, a. b. Fleta, VI., chap. 23, § 17. See Y. B., 20 Ed. I. 360 (Rolle's ed.); Keilway, 113 pl. 45. And it was said that "a covenant which runs and rests with the land ies for or against the assignee at common law, *quia transit terra cum onere*, although the assignee be not named in the covenant." Hyde v. Dean of Windsor, Cro. Eliz. 552, ibid. 457, s. c., 5 Co. Rep. 24a, Moore, 399.

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant; it is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties, as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is Pakenham's case. Y. B. 42 Ed. III. 3 pl. 14, when the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor. Spencer's case, 5 Co. Rep. 16a, 17b. Another which has been recognized in this Commonwealth is the *quasi* easement to have fences maintained. Bronson v. Coffin, 108 Mass. 175, 185, s. c., 118 Mass. 156. Repairs were dealt with on the same footing; they were likened to estovers and other rights of common. 5 Co. Rep. 24 a. b.; Hyde v. Dean of Windsor, *ubi supra*; see F. N. B. 127; Spencer's case, *ubi supra*; Ewre v. Strickland, Cro. Car. 240; Brett v. Cumberland, 1 Roll. R. 359,360; and other examples might be given. See Bract. 382, a, b; Fleta, vi. c. 23. § 17; Y.B. 20 Ed. I. 360; Keilway 2 a, pl. 2; Y. B. 6 Hen. vii. 14 b, pl. 2; Co. Litt. 384b, 385a; Cockson v. Cock. Cro. Jac. 125; Bush v. Cole, 12 Mod. 24; s. c., 1 Salk. 196; 1 Shower. 388; Carthew, 232; Sale v. Kitchenham, 10 Mod. 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said, in this class of cases, that there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi*-easement, or must be in aid of such a grant (Bronson v. Coffin, *ubi supra*), which is generally true, although, as has been shown, not invariably (Pakenham's case, *ubi supra*), and although not quite reconcilable with all the old cases, except by somewhat hypothetical historical explanation. But the expression, privity of estate, in this sense, is of modern use, and has been carried over from the cases of warranty where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and we will take it as intended to do so for the benefit of the land conveyed.

The restriction is in form within the equitable doctrine of notice. Whitney v. Union Railway Co., 11 Gray, 349; Parker v. Nightingale, 6 Allen, 341; see Tulk v. Moxhay, 2 Phillips, 774; Haywood v. Brunswick Building Society, 8 Q.B.D. 403; London & S. W. Railway Co. v. Gomm, 20 Ch. Div. 562; Austerberry v. Oldham, 29 Ch. Div. 750. But as the deed is recorded, it does not matter whether the plaintiff's case is discussed on this footing or on that of easement.

The question remains, whether, even if we make the further assumption, that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement, every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative cov-

enants, applies also to negative ones. They must 'touch and concern," or "extend to the support of the thing" conveyed. 5 Co. Rep. 16 a, Ibid 24 b. They must be "for the benefit of the estate." Cockson v. Cock, Cro. Jac. 125. Or as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. Keppell v. Bailey, 2 My. & K. 517, 535; Ackroyd v. Smith, 10 C. B. 164; Hill v. Tupper, 2 H. & C. 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked, what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in Brooks v. Reynolds, 108 Mass. 31; and an easement to have a quarry left unopened, the answer is, that whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly,—an easement not to be competed with,—and in that interest alone a right to prohibit one owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it be treated as merely personal in its burden. Whether that is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion.

Bill dismissed.

NOTE ON COVENANTS RUNNING WITH THE LAND.—A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it passes to the assignee of the land. The question as to whether a covenant does or does not run with the land, is most apt to arise in regard to covenants in leases. Is it such that if the lessee assigns his lease, his assignee can sue or be sued in his own name for breach of its stipulations? Or if the owner of the fee or reversion sell his interest in the property, what are the purchaser's rights and liabilities as to the covenants in the lease?

The leading case on this subject is known as Spencers Case, reported by Coke in the year 1583.[1] Spencer, by an indenture demised a house and certain land to S. for a term of years, by which indenture S. covenanted for himself, his executors and administrators (not assigns) that he, his executors, administrators and assigns would build a brick wall on part of the demised premises. S. assigned over his term to J., and J. to the defendant. For not making the wall the plaintiff brought his action against the defendant as assignee. It was decided that he could not recover, for the reason that if the covenant does not extend to a thing *in esse*, and part and parcel of the devise, it does not run with the land so as to bind the assignee of the covenantor, unless he is specifically so bound in the contract itself. The subject matter of the covenant must be in existence at the time of the devise, in order to bind any but the contracting parties and their personal representatives, unless he is specifically named therein. Although, as has been said, "the good sense of this is not very easily discernible." it has continued to be the law for three hundred years.[2]

All covenants, however, concerning real estate will not bind the assignee of the covenantor, even though the lease or deed in direct terms states that he is so bound. It is necessary, in addition, that the thing to be done must touch or concern the thing demised, and not be merely collateral to it.[3] Whether this is so in a particular case is not unfrequently a question of considerable difficulty. As Washburn says, the distinction is often subtle and refined.[4] Baily, J., in Congleton v. Pattison[5] states that the thing to be done must be on the land itself in order to run with it. This is clearly not the law. It is sufficient that it affects the nature, quality or value of the estate independent of collateral circumstances, or that it restricts the mode of enjoyment.[6] A covenant that the lessee must constantly reside on the premises will run with the land, because it restricts the mode of enjoyment, and also the value of the term.[7] So a covenant to cultivate the land in a particular manner.[8] It is important that the covenant should affect the value of the estate *independent of collateral circumstances*, in order to have it run with the land. Thus in Congleton v. Pattison the lessee of a water privilege covenanted not to employ in the mill to be erected on the premises, any persons settled in other parishes without a parish certificate. It was argued that this was a covenant affecting the value of the property, for the reason that if it was not complied with, the workman might become a burden to the parish, and the taxes on the mill increased. It was held that this would not affect the property or its value *per se*, but only collaterally, and so could not run with the land. The case of Norman v. Wells,[9] goes to the extreme limit of the law in applying the principle that a covenant will run with the land when it affects the value of the property or term. A lease was executed of a mill cite on a certain stream, the lessor covenant-

1 Spencer's Case, 5 Rep. 1.

2 Platt. Cov. 466, 471; Hunt v. Danforth, 2 Curt. C. C. 604; Sampson v. Easterby, 9 B. & C. 505; Bean v. Dickinson, 2 Hump. 126; Doughty v. Bowman, 11 Q. B. 44; Wilkinson v. Rogers, 10 Jur. N. S. 5.

3 Twiningham v. Pickard, 2 B. & Ald. 105.

4 1 Washburn Real Prop. 496.

5 Congleton v. Pattison 10 East, 130.

6 Vyvyan v. Arthur, 1 B. & C. 410; Baily v. Wells, 3 Wils 27; Dean & Chapter of Windsor's Case, 5 Rep. 24.

7 Tattern v. Chaplin, 2 H. Bl. 133.

8 Cockson v. Cock, Cro. Jac. 125.

9 Norman v. Wells, 17 Wend. 136.

ing that he would not let or establish any other place or cite on the same stream to be used for the same business as that carried on by the lessee. The court held that a subsequent demise by the covenantor of another site on the same stream, without condition or restriction as to its use, and the erection of a mill for that purpose was a breach of the covenant, and that action could be brought by the assignee of the first lease on the ground that the covenant ran with the land because it affected the value of the property. A nearly similar case, a quite recent one, Thomas v. Hayward is decided the other way. A lessor of property to be used as a public house covenanted with the lessee not to build, erect or keep a house for the sale of spirituous liquors within half a mile of the premises. It was held that this covenant did not run with the land and that the assignee of the lessee could not sue for breach thereof, as it affected the value of the land only collaterally, and not *per se*.[10] While both courts agree as to the principles of law, they differ widely in applying them. A somewhat similar case is that of Taylor v. Owen.[11] A. being the owner of a town in fee, leased one of the houses to B. for a term of years, covenanting in the lease that B. should have the exclusive privilege of vending merchandise in the town during his term. After the execution of this lease, A. leased another house in the town to C. without any restrictions as to the business to be carried on there, and the sale of merchandise was commenced therein. This case differs from Norman v. Wells and Thomas v. Hayward in that the original lessee brings the suit against the assignee of the lessor, instead of the assignee of the lessee suing the original lessor; so that the point decided may not have been precisely the same But the court said, in rendering the decision, that such covenants are merely of a personal nature; that a *bona fide* vendee or lessee of real estate is not affected by such a personal covenant. Cowen, J., in Norman v. Wells, after an elaborate review of former decisions concerning covenants, admits that they leave the application of old principles to new cases, a very nice exercise of the mind, and remaining in a greater degree a matter for judicial discretion than almost any other of equal importance in the law of property.

Another principle has been applied to the solution of this class of cases. If the covenant is such that it is beneficial only to the assignee of the estate, and ceases to be beneficial to him who has parted with his interest in the property, so that it may be said to be beneficial to the estate itself, it will generally run with the land.[12a] In Vyvyan v. Arthur, the owner of a mill and certain lands demised the lands the lessee besides covenanting to pay rent etc., covenanted also to have all his corn ground at the lessor's mill. It was held that, so long as the mill was owned by the owner of the reversion, the covenant would run with the land, not only because it was in the nature of rent, but also because beneficial to the owner of the reversion as such. As Best, J., expressed it, "If the performance of the covenant is beneficial to the reversioner, in respect to the lessors demand, and to no other person, his assignee may sue upon it; but if it is beneficial to the lessor without regard to his continuing the owner of the estate, it is a collateral covenant, and the assignee cannot sue.

A common law in England, covenants, while they might run with the land, so as to enable the assignee of the lessee to sue or be sued on them, would not run with the reversion. By the statute of 32 Hen. viii. c. 34, this was changed so that the assignee of the reversion may also sue or be sued in the same manner as the reversioner. It is, however, held that this statute only applies to such covenants as concern the thing demised and not to collateral covenants.[13] This statute is in force either as part of our common law, or as reenacted by statute, in many of the States.[14] A covenant to pay rent will run with the land and with the reversion. The question has often arisen, whether the lessor can assign the rent and retain the reversion, or can sell the reversion and reserve the rent. In other words, can the right to the rent be separated from the reversion? It has been generally held, in this country at least, that it can, and that the covenant to pay rent will run with the rent alone, and that the assignee of the rent may maintain an action in his own name, against the lessee or his assignee.[15] Some cases, however, hold otherwise.[16] At common law it was necessary that the tenant should attorn to the new landlord before he could sue for rent in his own name. This was changed in England by the statute. 4 Anne, c. 16, s. 9. As this statute was enacted before the Revolution, and being a rule in amendment of the common law, it is probably generally in force in this country. Where it is in force, attornment is not necessary.[17] The assignee of the reversion of part of the premises may sue and be sued on covenants which run with the land;[18] but such assignee cannot maintain an action for a breach of covement affecting the whole estate, as it cannot be apportioned.[19] A public lessee is, of course, not liable on the lessee's covenants, as there is neither privity of contract nor estate existing between the lessor and such sub-lessee. To render one liable as assignee, he must take an assignment of the whole or part of the premises for the whole term.[20]

A covenant will often run with the land where the relation of lessor and lessee does not exist. It is stated that in such a case there is a distinction between the burden and the benefit of a covenant; that the benefit of a covenant may run with the land so as to be enforced in the name of the assignee, although made with a stranger to the title; but that the burden of the covenant will only run with the land when there exists a privity of estate between the parties; or that a

10 Thomas v. Hayward, L. R. Exch. 4 311.

11 Taylor v. Owen, 2 Blackf. (Ind.) 301.

12 Vernon v. Smith, 5 B. & Ald. 1; Aiken v. Albany R. Co., 26 Barb. 289; Laffan v. Naglee, 9 Cal. 677.

12a Vyvyan v. Arthur, 1 B. & C. 410.

13 Spencer's Case, 5 Rep. 1.

14 New Hampshire: Mussey v. Holt, 4 Foster, 248. Massachusetts: Pat'en v. Deshon, 1 Gray, 325. New York: Van Rensselaer v. Read, 26 N. Y. 558. Maryland: Funk v. Kincaid, 5 Md. 404. Pennsylvania: 3 Binn. 625. Alabama: English v. Key, 39 Ala. 113. New Jersey: Rev. Stat. 32, § 643. Missouri: Rev. Stat. 32, § 11. Illinois: Plumlegh v. Cook, 13 Ill. 669. Connecticut: Baldwin v. Walker, 21 Conn. 168. It is not in force in Ohio. Mosury v. Southworth, 9 Ohio St. 346; Crawford v. Chapman, 17 Ohio, 449.

15 Hunt v. Thompson, 2 Allen (Mass.), 341; Willard v. Tillman, 2 Hill (N. Y.), 274; Childs v. Clerk, 3 Barb. Ch. 52; Demorest v. Willard, Cow. 206; Streaper v. Fisher, 1 Rawle (Pa.), 155; St. Mary's Church v. Miles, 1 Whart. 229; Scott v. Lunt, 7 Pet. 596; Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Read, 29 N. Y. 558; Tyler v. Heidon, 46 Barb. 439; Moffatt v. Smith, 4 Comst. 126; Allen v. Bryan, 5 B. & C. 512.

16 Milnes v. Branch, 5 Maule & S. 411; Randall v. Rigby, 4 M. & W. 135.

17 Moss v. Gallimore, 1 Doug. 279; Burden v. Thayer, Met. 76. It is not in force in Illinois. Fisher v. Deering, 60 Ill. 114.

18 Twynam v. Pickard, 2 B. & Ald. 105; Daniels v. Richardson, 22 Pick. 565; Gammon v. Vernon, 2 Lev. 231.

19 Doe v. Lewis, 5 A. & E. 277.

20 Holford v. Hatch, 1 Doug. 183; Campbell v. Stetson, 2 Met. 504; Shattuck v. Lovejoy, 8 Grey, 204; Patten v. Deshon, 1 Gray, 329; Bedford v. Terhune, 30 N. Y. 460.

covenant *with* the owner of land will run with it, if touching or concerning the estate, whether there is privity of estate or not; but that in a covenant *by* the owner of land, privity of estate is essential. This view is supported by several authorities, including that of Coke.[21] The American editor of Smith's Leading Cases, advocates this doctrine, and States that the burden of a covenant will only run where the relation of landlord and tenant exists.[22] He is clearly wrong in this, and the better and more modern authorities hold that neither the benefit nor burden of a covenant will run with the land unless there is privity of estate between the parties. The term privity of estate is, however, not used in this connection in its technical meaning. It is generally said to exist only when there is the relation of landlord and tenant, or an identity of title, as between the owner of a life estate, or an estate for years and the reversioner. It is, however, stated that any interest in the nature of an easement, created by the covenant between the grantor and the grantee, constitutes a sufficient privity of estate to enable the covenant to run with the land both as to the burden and the benefit.[23] Thus in Bronson v. Coffin[24] the grantor of certain land in fee to a railroad company covenanted for himself and his heirs and assigns to erect and forever maintain a fence between his remaining land and the part conveyed to the company. This was held to run with the land and to constitute an incumbrance on the remaining land of the grantor. This principle suggests to conveyancers the necessity, in examining titles to real estate, of examining deeds by the owner of the property of his adjoining lands, to see that no incumbrances in the way of covenants or easements are created therein.

A covenant in a deed of land adjoining a plat of ground belonging to the grantor, and which he has thrown open to the public, and called a public square, that he will not build thereon, runs with the land and can be enforced by the grantee of the first purchaser.[25] So, a description in a deed bounding property by a way, estops the grantor and those claiming under him from denying the existence of such way.[26] A deed bounding land on a street described on a plan of lots referred to in the deed raises a covenant that such a street exists of the full extent and width as laid down in the plan,[27] and also a covenant that the grantee and his assigns shall have the use thereof.[28]

There is a class of English cases which hold that restrictive covenants may sometimes be enforced against the assignee of the covenantor when he has had notice of the covenant before purchasing, which otherwise would not run with the land.[29] This doctrine is not extended to covenants not restrictive, such as those requiring an expenditure of money, or any affirmative act.[30] I do not find this principle supported by any American authorities,[31] although in all cases actual notice, or constructive notice by way of record, of incumbrances on land created by such instruments as by the registry laws are required to be recorded in order to affect third parties, is necessary in order to bind a subsequent purchaser from the covenantor.

Covenants only run with the land until breach; they then become choses in action which cannot be assigned. Therefore suit cannot be brought by or against an assignee for breach of covenants that have fully occurred before assignment.[32] Thus it is held generally in this country that covenants of seisin, of a right to convey, and against incumbrances will not pass to an assignee, for the reason that if they are not true, they are broken as soon as made, and so become mere choses in action.[33] But in England and Indiana, Ohio, Missouri, Wisconsin, and South Carolina, the courts argue that these covenants are continuing in their nature, and will therefore run with the land.[34] Covenants for quiet enjoyment, warranty, and further assurance, as well as all implied covenants, will run with the land.[35] The lessee remains liable on his express covenants, although he has assigned over his lease.[36] An assignee, however, is only liable for covenants broken while he is in possession of the estate. He can rid himself of liability for future breaches of covenant by assigning over his interest, but continues liable for covenants broken while the privity of estate existed.[37]

In actions of covenant where the suit is founded on privity of contract, the action is transitory; but where the covenant has passed to an assignee, so that the ground by which it may be enforced is privity of estate only, it is a local action, and must be brought in the county where the land lies.[38] By the statute of 32 Hen.

21 Allen v. Culver, 3 Denio, 184, 301; Dickinson v. Hoomes, 8 Gratt. 353, 403; Cole v. Hughes, 54 N. Y. 444; Co. Lit. 384. b.

22 Smith's Leading Cases, 5th Am. ed.; notes to Spencer's Case.

23 Webb v. Russell, 3 T. R. 393; Hurd v. Curtis, 19 Pick. 459; Van Rensselaer v. Bonested, 24 Barb. 365; Scott v. Burton, 1 Ashmead, 321; Hirst v. Rodney, 1 Wash. C. C. Rep. 375; Royer v. Ake, 3 Pa. 461; Herbaugh v. Zentmyer, 2 Rawle, 159.

24 Bronson v. Coffin, 108 Mass. 175; Demorest v. Willard, 8 Cow. 206; Willard v. Tillman, 2 Hill, 274; Burbank v. Pillsbury, 58 N. H. 475.

25 Watertown v. Cohen, 4 Paige, 510.

26 Parker v. Smith, 17 Mass. 412.

27 Thomas v. Poole, 7 Grey, 83; Livingston v. Mayor of New York, 8 Wend. 98; Farnsworth v. Taylor, 9 Gray, 162; Morgan v. Moore, 3 Gray, 319.

28 Moale v. Mayor of Baltimore, 5 Md. 314; Greenwood v. Wilton Railroad, 23 N. H. 261: Matter of Twenty-Third Street, 19 Wend. 128.

29 Tuck v. Moxley, 2 Ph. 774; Cox v. Bishop, 8 DeG. M. & G. 815; Wilson v. Hart, L. R. 1 Ch. 463.

30 Heyward v. Brunswick, etc., L. R. Q. B 8 403; Cooke v. Chilcott, 3 Ch. D. 694.

31 Taylor v. Owen, 2 Blackf. 301.

32 Shelby v. Hearne, 6 Yerg. 512; St. Saviour v. Smith, Burr. 1271; Grescott v. Green, 1 Salk. 199; Tillotson v. Boyd, 4 Sandf. 516; Cuthbertson v. Irving, 4 Hurl. & Norm. 742; Walton v. Crowly, 14 Wend. 62; Hentze v Thomas, 7 Md. 346; Paul v. Nurse, 8 B. & C. 486; Patten v. Deshon, 1 Gray, 329; Johnson v. Sherman, 15 Cal. 287; Quackenbush v. Clarke, 12 Wend. 557; Armstrong v Wheeler, 9 Cowen, 89.

33 Hacker v. Storer, 8 Greenleaf, 228; Heath v. Widden 24 Maine, 283; Garfield v. Williams, 2 Vt. 324; Mitchell v. Warner, 5 Ct. 497; Davis v. Lyman, 6 Ct. 249; Bickford v. Page, 2 Mass. 455; Wheelock v. Thayer, 16 Pick. 68; Clark v. Swift, 3 Met. 390; Hamilton v. Wilson, 4 Johnson, 72; Townsend v. Morris, 6 Cohen, 123; Bedloe v. Wadsworth, 21 Wend. 120; Garrison v. Sandford, 7 N. J. 261; Rice v. Spotteswood, 6 Monroe (Ky.), 94; Ross v. Turner, 2 Eng. (Ark.) 132; Pillsbury v. Mitchell, 5 Wis 21; Rawle Covenants for Title, 333.

34 Kingdom v. Nottle, 1 Maule & S. 355; King v. Jones, Taunt. 418; Jones v. King, 4 Maule & S. 188; Martin v. Baker, 5 Blackf. 232; Devore v. Sunderland, 17 Ohio, 52; Dickson v. Desire, 23 Mo, 151; Jeter v. Green, 9 Richardson (S. C.), 376; Wickam v, Blake, 22Wis 472.

35 Suydam v. Jones, 10 Wend. 180; Hunt v. Amidon, 4 Hill, 345; Campbell v. Lewis, 2 B. & A. 392; Roe v. Hayley, 12 East, 414; Colby v. Osgood, 29 Barb. 339; 4 Kent Com. 473; Russ v. Steele, 40 Vt. 310.

36 Anrive v. Mills, 4 T. R. 98; Knupton v. Walker, 9 Vt 199; Walker v. Physick, 5 Pa. St. 193.

37 London v. Richmond, 2 Vern. 421; Pitcher v. Tovey, 4 Mod. 71; Armstrong v. Wheeler, 9 Cow. 88; Thursby v. Plant, 1 Saund. 240; Church v. Brown, 15 Ves. 265; Derby v. Taylor, 1 East, 502; Goddard v. Keate, 1 Vernon, 87; Davis v. Morris, 36 N. Y. 569; Valliant v. Dodemede, 2 Atk. 546.

38 1 Chitty on Pleading, 283; Clark v. Scudder, 6 Gray

8, c. 34, actions of covenant by the assignee of the reversion may be brought in the manner as if between the original parties, so that in England actions brought by the assignee of the reversion are transitory.[39] This would probably be the case in this country in States where this statute has been re-enacted or is a part of the common law.[40]

EDMUND P. KENDRICK.

Springfield, Mass.

122; Lienow v. Ellis, 6 Mass. 331; White v. Sanborn, 6 N. H. 220; Binney v. Hain, 2 Litt (Ky.) 262

[39] Webb v. Russell, 3 T. R. 395.

[40] White v. Sanborn, 6 N. H. 220.

SUBROGATION — RULE IN *EX PARTE* WARING.

EX PARTE DEVER.*

English Court of Appeal.

SUBROGATION. [*Negotiable Paper.*] *Right of Holder of Bill of Exchange in Respect of Collateral Securities in Case of Bankruptcy of Both Drawer and Acceptor.*—Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill. Rule in *Ex parte* Waring, 2 Rose, 182; 19 Ves. 344, as stated in the above terms in Eddis's Treatise on the rule, page 5, adopted and applied.

This was an appeal by Mr. Dever, the trustee in liquidation of the debtors Suse and Sibeth, from an order of Mr. Registrar Pepys directing that the proceeds of certain bills of exchange which were in the hands of the trustee should be applied to the payment of certain other bills accepted by the debtors. Messrs. Suse and Sibeth were merchants and bankers in London. Messrs. Fryer, Schultze, and Co. were merchants trading at Colombo, in Ceylon. On the 15th Sept. 1882 Suse and Sibeth sent to Fryer, Schultze, and Co., at their request, a letter of credit in the following terms:

"We hereby authorize you to draw on us at three, four, or six months' sight, for any sums not exceeding £10,000 at one time, such draft or drafts to be covered within two, three, or five months, (according as they have been issued at three, four, or six months) by your remittances on good London houses, with bills of lading, and invoices of the produce to which such remittances refer, attached. This credit resumes its original force as soon as your drafts have been covered in the manner described above. And we hereby agree with you, and also as a separate engagement with the *bona fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity, if drawn or negotiated up to the 1st of September, 1883.

C. J. Sibeth, one of the partners in the firm of Suse and Sibeth, made an affidavit which contained the following statements:

"In accordance with the course of dealing between the respective firms of Suse and Sibeth and Fryer, Schultze, and Co., acceptance commission was payable to Suse and Sibeth upon all drafts drawn upon and accepted by them under the letter of credit, and where, as was generally the case, the remittances sent as cover for the drafts matured later than the drafts accepted, interest was debited by Suse and Sibeth against Fryer, Schultze, and Co. from the date of maturity of the acceptances to that of the maturity of the remittances; while in the converse case, where the remittances matured earlier than the acceptances, interest was credited to Fryer, Schultze, and Co., and Suse and Sibeth in all cases dealt with the remittances as they thought most expedient, and the proceeds were paid into the general banking account of the firm. Under the terms of the letter of credit. Fryer, Schultze, and Co. would be at liberty, after having covered their drafts drawn thereunder in the way provided for by the letter of credit, to draw another £10,000, to be covered in like manner, such a credit being known in the mercantile world by the name of a "revolving credit.'"

On the 4th Oct. 1883, Suse and Sibeth stopped payment; on the 9th Oct. they filed a liquidation petition. H. Dever was appointed receiver of their estate and manager of their business. The creditors afterwards resolved on a liquidation by arrangement, and appointed Dever trustee.

At the time when the petition was filed Suse and Sibeth had accepted drafts to the amount of £11,535 under the letter of credit, for the accommodation of Fryer, Schultze and Co. Against these drafts Suse and Sibeth had received from Fryer, Schultze, and Co. remittances in cash or bills to the amount of £3,009 15s. 8d., out of which two bills remained unconverted when the petition was filed, viz., a bill for £255 4s. 2d., dated the 11th Aug. 1883, and another bill for £640 14s. 1d., dated the 5th Sept. 1883. After Dever had been appointed receiver and manager, but before he was appointed trustee, he received two bills, one for £768 18s. and one for £762 10s., sent to Suse and Sibeth by Fryer, Schultze, and Co. as cover under the letter of credit. Among the bills drawn by Fryer, Schultze, and Co., and accepted by Suse and Sibeth, under the letter of credit, was one for £1,000, numbered 753, due the 2nd Nov. 1883; one for £1850, numbered 772, due the 5th Nov., 1883; and one for £950, numbered 778, due the 26th Nov. 1883. These three bills were all held for value, the two first-mentioned by the Chartered Mercantile Bank, and the third by the Comptoir d'Escompte de Paris.

S. c., 53 L. T. (N. S.) 131; reported by B. P. Hutchins, Esq., Barrister at Law.

Up to the 11th Aug. 1883, Fryer, Schultze and Co. had duly provided Suse and Sibeth with all the cover which they were entitled to receive up to that date in respect of the bills drawn on them, including part cover for the bill for £1,850 (No. 772).

On the 11th Aug. 1883, Fryer, Schultze, and Co. wrote to Suse and Sibeth:

"Inclosed we beg to hand you—

No. 813. £672 2s. 3d., 3 m s of Marseilles } payable
No. 814. £255 4s. 2 d., " " } London.

in further cover of our draft (No. 772) for £1,850. We also inclose B L for 200 bags native coffee, to be delivered against payment of draft No. 813, and B L for fifty bales cinnamon, to be delivered against payment of draft No. 814."

On the 5th Sept. 1883, Fryer, Schultze, and Co. wrote to Suse and Sibeth:

"Inclosed we beg to remit our draft No. 824, £640 14s. 1d., at 3d m s on J. B. Bastide & Fils, Marseilles, payable London, with B L for 200 bags native coffee, per Yangtse, which is to be delivered against payment of our above draft. Please to apply £150 in final cover of our draft No. 772 for £1,850 and the balance of £490 14s. 1d. in part cover our draft No. 753 for £1,000."

The documents referred to in the above two letters were received by Suse and Sibeth:

On the 18th Sept. 1883, Fryer, Schultze and Co. wrote to Suse and Sibeth:

"Inclosed we beg to remit our draft No. 837 for £768 15s., 3 m s of Kleinwort, Cohn, and Co., with B L of 200 bales cinnamon, per Clan Grant, to be delivered against acceptance. Please to apply £580 out of this draft as final cover for our draft No. 753 for £1,000 (due the 26th Nov.), and the balance (£238 15s.) as part cover for No. 778 for £950 due same date."

On the 28th Sept. 1883, Fryer, Schultze, and Co. wrote to Suse and Sibeth:

"We beg to remit inclosed our draft No. 842 for £762 10s., 3d m s of Messrs. Tesdorf and Co., in final cover of our draft No. 778, for £950, due 26th Nov. We also enclose B L for 200 bales cinnamon, to be delivered against acceptance of our draft."

The documents referred to in the letters of the 18th and 28th Sept. were received by Dever as receiver and manager after the filing of the liquidation petition, and the proceeds of the remitted bills were received by him as trustee in the liquidation.

The failure of Suse and Sibeth, caused Fryer, Schultze and Co. also to stop payment. There were two partners in the firm, W. D. Schultze and N. D. Schultze. W. D. Schultze had executed a power of attorney to enable his partner to carry on the business, and had afterwards become, and still was at the date of the failure, of unsound mind; he had been for some years resident in Germany. N. D. Schultze made the following statement, which was not contradicted:

"Acting upon the requirement of the creditors of my firm, and with a view to securing, as far as possible, the winding-up of our affairs by the court, I, in the month of Nov. 1883, procured myself to be duly adjudicated insolvent by the District Court of Colombo, in Ceylon, the court within the jurisdiction of which my firm carried on business, and under this insolvency R. L. M. Browne has been duly appointed, and is now, the assignee, and my estate, and also the estate of my firm, as far as legally can be, is now being administered and wound-up."

An application having been made by the Chartered Mercantile Bank and the Comptoir D'Escompte, Mr. Registrar Pepys held that the remitted bills had been specifically appropria ed to the payment of the particular acceptances which they were sent to cover, and that the joint estate of Fryer, Schultze, and Co., as well as that of Suse and Sibeth, was insolvent, and was brought under a forced administration, and therefore the rule in *ex parte* Waring, 19 Vesey, 344; 2 Rose, 182; applied, and he accordingly made an order declaring that the proceeds of the four remitted bills for £255 4s. 2d., £640 14s. 1d., £768 15s., and £762 10s., were specifically applicable to the payment of the three bills held by the Chartered Mercantile Bank and the Comptoir d'Escompte, and ordered that the proceeds should be applied by the trustee as follows, viz.: the proceeds of the bill for £255 4s. 2d. and £150, part of the proceeds of the bill for £640 14s. 1d., to the payment of the bill No. 772 for £1750; £490 14s. 1d., the balance of the proceeds of the bill for £640 14s. 1d., £530, part of the proceeds of the bill for £768 15s., to the payment of the bill No. 753 for £1,000; and £238 15s., the balance of the proceeds of the bill for £768 15s., and the proceeds of the bill for £762 10s., to the payment of the bill No. 778 for £950.

The present appeal was from this order.

Cohen, *Q. C.*, and *Sidney Woolf* for Dever, the trustee of Suse and Sibeth, in support of the appeal; *Winslow*, *Q. C.*, and *A. C. Nicoll* for the Chartered Mercantile Bank and the Comptoir D'Escompte; *Brabant* for Brown, the assignee of Fryer, Schultze, and Co. in the insolvency in Ceylon. The following authorities were referred to: *Ex parte* Waring, 2 Rose, 182; 19 Vesey, 344; *Re* The Gothenburg Commercial Company, 42 L. T. Rep. N. S. 174; reversed, 44 L. T. Rep. N. S. 166; Royal Bank of Scotland v. Commercial Bank of Scotland, 47 L. T. Rep. N. S. 360; 7 App. Case 366; Powles v. Hargreaves, 3 De G. M. & G. 430; *re* Barned's Banking Company, 31 L. T. Rep. N. S. 862; L. Rep. 19 Eq. 1. L. Rep. 10 Ch. 198; *ex parte* Broad; *re* Neck, 51 L. T. Rep. N. S. 388; 13 Q. B. Div. 740; *ex parte* Dever; *re* Suse, 51 L. T. Rep. N. S. 437; 13 Q. B. Div. 766; Tooke v. Hollingworth, 5 T. R. 215; *ex parte* Gomez; *re* Yglesias, L. Rep. 10 Ch. 639; Barker v. Goodair, 11 Vesey, 78; City Bank v. Luckie, L. Rep. 5 Ch. 773.

BRETT, M. R.—I decline to discuss how the rule

in *Ex parte* Waring came to be laid down, or to consider whether it is a good or a bad rule; all that we have to do is to apply it. Its effect seems to me to be accurately stated by Mr. A. C. Eddis, in his treatise on the rule. He states the rule thus (p. 5): "Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor; then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill." The question here is whether the applicants have brought themselves within this rule, and it is necessary to ascertain whether there was a security which, by virtue of a contract between the drawer and the acceptor, was specifically appropriated to meet each of the bills at maturity. That must depend upon the construction of the letter of credit. The letter of credit says that the draft or drafts drawn under it are "to be covered within two, three, or five months (according as they have been issued at three, four, or six months) by your remittances on good London houses." Under that provision, a draft issued at three months is to be covered by a remittance sent forward within two months, a draft at four months by a remittance within three months, and a draft at six months by a remittance within five months. It seems to me that it would be impossible more clearly and conclusively to divide the remittances, so as to make each remittance applicable to the payment of the particular draft to cover which it is sent forward. The last clause of the letter of credit also seems to show that each draft was intended to be a separate transaction; it is in these words: "We hereby agree with you, and also, as a separate engagement, with the *bona fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity." If they can legally make such a contract in this way, it is a separate contract with the holder of each draft. The subsequent letters of the drawers cannot alter the contract, but they afford an inference that the remittances were sent forward in accordance with the contract as the parties understood it. The result is that, by virtue of a contract between the drawer and the acceptor, a security has been specifically appropriated to meet each acceptance at maturity, and it has been lodged for that purpose by the drawer with the acceptor. It is clear that here the estate of the acceptors is being administered under a forced administration. It has been disputed whether the drawers' estate is also being administered under a forced administration; but the evidence which has been given as to the facts, and as to the law of Colombo, seems to me to show that the partnership estate of the drawers is under a forced administration at Colombo. Therefore, the bill-holders, who are the applicants in the present case, though neither parties nor privies to the contract, are entitled to have the specifically appropriated security applied in or towards payment of the bills which they hold. The case is thus brought within the express terms of the passage which I have read from the treatise by Mr. Eddis. But it is argued that in the present case the state of things is altered by reason of the way in which interest was credited and debited, and the case of *Re* Gothenburg Commercial Company, *ubi sup.*, is cited as an authority for that proposition. In my opinion, the true meaning and effect of that decision is that, if the person to whom the securities are sent uses the proceeds for his own purposes, and credits the sender with interest upon the amount of the proceeds, and the sender does not object, then, so far as the securities are thus used, they are taken out of the rule in *Ex parte* Waring, *ubi sup.*, because to that extent the security is gone. But, although some of these securities may have been thus taken out of the rule, still, with regard to those which were not so treated, but which remained in specie at the date of the bankruptcy, the rule in *Ex parte* Waring, *ubi sup.*, applies, and this view is entirely in accordance with the latter part of the judgment in *Re* Gothenburg Commercial Company, *ubi sup.* Then it is said that these securities were sent to cover the whole of the bills drawn under the letter of credit. If that were so, the rule in *Ex parte* Waring, *ubi sup.*, would still apply, but it would apply in favor of all the holders of acceptances. But, in my opinion, that is not so, for this reason; that, on the true construction of the letter of credit, the remittances were sent to cover specifically and respectively the acceptances as cover for which they were sent forward. Another point has been raised, and that is, whether the court ought not to deal with the existing securities for the benefit of all the holders of acceptances to cover which remittances have been sent. Those persons, however, who have not got a security specifically appropriated to meet the acceptances which they hold, do not come within the rule. If, rightly or wrongly, any of the securities have been realized by the debtors, in that case there is no security to which the rule in *Ex parte* Waring, *ubi sup.* can apply. But that is no reason why the holders of other acceptances, the securities for which are still in existence, should not have the benefit of the rule. For these reasons I am of opinion that the decision of the registrar was right, and ought to be affirmed.

COTTON, L. J.—I am of the same opinion. I will deal first with the last objection, which is that the estates of the drawers and the acceptors of the bills are not both being judicially administered under a forced administration, as one of the partners in the drawers' firm is solvent, and resides in Germany. I think that difficulty has been satisfactorily explained. The partner who resides in Germany is of unsound mind, and the

business of the partnership has been carried on under a power of attorney given by him when he was of sound mind, and the affidavit of the other partner states that the joint estate, so far as the law will allow, is being administered under the insolvency in Ceylon, and this statement is not contradicted. I think, therefore, that we must take it as a fact that the joint estate is being administered just as it would be under similar circumstances in England. The next question is as to the rule in *Ex parte* Waring, *ubi sup.* That rule is very well stated by Mr. Eddis in the passage in his treatise which has been read by the Master of the Rolls; but I think what he says may lead to a little misapprehension, because it might be inferred that the rule would not apply, unless there had been an appropriation of a security to meet a particular bill. In my opinion, if there has been a general appropriation of securities to meet the bills drawn by A. upon B., the securities must be applied in accordance with the rule in *Ex parte* Waring *ubi sup.* As I understand the principle of that rule it is this: The court finds in the hands of a bankrupt certain property, which has been remitted to him by another person (who has himself also become bankrupt) in order to secure him against a liability which he has undertaken upon bills drawn on him by that other person. The property, under such circumstances, cannot be applied in paying the general creditors of the acceptor, because it was in his hands impressed with a trust; neither can it be applied to pay the general creditors of the drawer, because he was not entitled to have it back without meeting the acceptances. The court thereupon applies the property in such a way as to carry out as far as possible the equities between the two estates—that is to say, in paying the acceptances to cover which it was sent. The rule assumes that the property which is in the hands of the acceptor is not his own absolute property, for, if it were, it would have to be applied to pay his creditors generally. The first objection which has been taken in the present case is, that no trust was impressed on the remittances, because, if there were a trust, it could be enforced as against any of the proceeds of the remitted bills which have been already converted into money, and which can be traced. That, however, is not quite accurate. The question is, whether, in the events which have happened, at the moment when the bankruptcy took place, the bankrupt was entitled to apply the remitted bills which were then in his hands to any purpose he pleased. It may well be that, so long as he is solvent, the holder of remittances which have been made to him in this way is, by mercantile usage or by the course of dealing between the parties, entitled to apply the proceeds of such remittances for his own benefit in any way he pleases. But that does not show that, at the moment when he is no longer able to meet his acceptances, the remitted bills, if they remain in specie, are not subject to any equity in favor of the drawer of the bankrupt's acceptances, so as to enable the drawer to require them to be applied in meeting the acceptances. If the drawer were solvent he would be entitled to call upon the bankrupt to hand the remitted bills back to him upon his returning the acceptances. Independently of this, however, it is clear, to my mind, that, upon the true construction of the contract in the present case, the remittances were not intended to be dealt with by the acceptors in any way they might think fit, but were sent for the purpose of meeting the acceptances, and of enabling the acceptors to meet them. I am therefore of opinion that the rule in *Ex parte* Waring *ubi sup.* ought to be applied as regards those remittances which remained in specie at the commencement of the bankruptcy of the acceptors, in order to carry out the equities between their estate and the estate of the drawers. Then there arises a further point, which, so far as I know has never arisen before. At the time when the bankruptcy took place there were remittances to the amount of nearly £900 in specie in the hands of the acceptors, and other remittances to the amount of about £1500 were afterwards received by the trustee; but the time had not yet arrived when, according to the terms of the letter of credit, remittances ought to have been sent to cover other acceptances of the bankrupts. The question which arises is, whether the remittances which are in specie ought to be applied in payment of the particular acceptances to cover which they were sent, or in part payment of all the holders of acceptances under the letter of credit. It is admitted that the holders of the acceptances have no equity of their own, but, at the same time, it is contended that the remittances ought to be applied in paying all those persons who have claims against the estate of both the drawers and the acceptors in respect of bills drawn under the letter of credit. I think that if we were to accede to that contention we should be inventing a new equity, for, at the time of the bankruptcy, the acceptors had no right, as against the drawers, in respect of those acceptances, to meet which the time had not arrived for sending remittances. I am, therefore, of opinion that the remittances which are in specie cannot be applied in paying all the acceptances. The question then arises whether they ought to be applied in paying only those acceptances to cover which they were remitted, or in payment also of those acceptances in respect of which remittances had been made, but had disappeared before the bankruptcy. In my opinion, the payment ought to be limited to the former of these two classes of acceptances. I am not at all sure that it is strictly correct to say that there was a specific appropriation of the remittances to the payment of the particular acceptances, because that would look as if the holders of the acceptances had an equity of their own to have them so applied. I think the result of the letters written by the drawers to the acceptors is that there was only an appropriation

of the remittances to particular acceptances as between themselves. But I think it would be wrong to require the drawers, supposing they were solvent, to provide again for those acceptances, the liability on which had already been provided for by remittances. I am therefore of opinion that the equity ought to be applied only in favor of the holders of those acceptances to meet which the remittances had been sent.

LINDLEY, L. J.—I also think that the order of the registrar is right. With regard to the point that the drawers' firm is solvent, the facts are a little peculiar. One of the partners in the firm is a lunatic, and resides abroad, and the joint estate is being wound-up on the petition of the other partner. I think that is quite right under the circumstances, and that a similar proceeding would be adopted in this country in a case where one of the partners of a firm was a lunatic and resident abroad. I am therefore of opinion that there is a double insolvency under a forced administration. Then we have to deal certain remittances which are in specie, and had not been converted into cash before the bankruptcy. If the remittances which are in specie had been converted into cash before the bankruptcy, the bankrupts would have been entitled to deal with the proceeds as they pleased; but it does not follow that, if they are not converted into cash, they are not to be treated as specifically appropriated. Having regard to the terms of the letter of credit, and the course of dealing between the parties, I think these remittances were as much specifically appropriated as those in any of the cases in which the question of specific appropriation has ever arisen. This gets rid of the argument upon the application of *Ex parte* Waring *ubi sup*. Then there is a third point, which is a little more troublesome. There were acceptances under the letter of credit amounting to over £11,000, and remittances were made to an amount exceeding £4,500. The question is, whether the remittances which are in specie ought to be applied rateably in paying all the acceptances, or only in paying the particular acceptances to meet which those remittances were sent. The only safe course is to consider the rights of the drawers at the time of the bankruptcy. Could the drawers then have insisted on having the remittances applied in taking up the particular acceptances, or could the acceptors have insisted on applying them to the payment of all the acceptances? In my opinion, the correct view is that the drawers could have insisted on the application of the remittances to the particular acceptances in respect of which they were sent. No doubt the result will be that some of the holders of acceptances will be paid in full, but I think that is generally the result of the rule in *Ex parte* Waring *ubi sup*. For these reasons I agree that the appeal cannot succeed.

Appeal dismissed.

Solicitors for the appellant. *Roberts* and *Barlow*; solicitors for the respondents, *Clarke*, *Rawlins* and *Clarke*.

NOTE.—The right of a particular creditor to participate in collateral securities arises either;

1. Though the doctrine of subrogation.

2. Though contract expressly or impliedly made in his favor in respect thereto; and these are trust to secure the *debt*.

3. When the security is given to indemnify a particular *person* in respect to his liabilty for the debt, the creditor's right to subject the security arises solely through the equities of the original parties, by and to whom the security was given.

1. The right of subrogation is one of the highest equity; it does not depend upon contract; an attaches in favor of insurers; or of one who being himself a creditor has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought in whole or in part to have been paid by another; or an heir who has paid the debts of the succession; or of one who has paid his own debt, the burden of which has for a valuable consideration been assumed by another; or in short whenever one has been compelled to pay a debt which ought to have been paid in whole or in part by another, he is entitled to a cession of all the remedies which the creditor possessed against that other: Sheldon Subro., § § 3, 11; and therefore succeeds to every security to which the creditor, whom he has paid, was entitled. Furnold v. Bank of Mo , 44 Mo. 339; Ellsworth v. Lockwood, 42 N. Y. 89; Eaton v. Hasty, 6 Neb. 425; Dening v. Winchelsea White & Tud. Ld. Cas. 100. Before the right of subrogation accrues the party seeking it must have paid the debt of the principal: Morrison v. Tennessee etc. Ins. Co., 18 Mo. 262; Sheldon Subro. § 6. The doctrine being purely equitable, it will be applied with due regard to the legal and equitable rights of others; Sheldon Sub. § 4. Therefore the party will be subject to the same equities which existed in favor of the person to whose rights he has succeeded, and will not be in entitled to any superior rights: Logan v. Mitchell, 67 Mo. 524.

2. In respect to security given to secure a debt, a trust is created which inures to the benefit of all subsequent holders of the debt, whether the debt be negotiable in form, or not; Jones v. Quinnipiack Bk., 29 Conn. 25. A trust is impressed upon the security in favor of the debt, and the transfer of the debt works a transfer in equity of the incidental security: Moses v. Murgatroyed, 1 John, Ch. 119; Carpenter v. Logan, 16 Wall. 271; Judge v. Voget, 38 Mich. 568; Esty v. Graham, 46 N. H. 169; Rice v. Dewey, 13 Gray, 47; Eastman v. Foster, 8 Met. (Mass.) 19. The security is not regarded as a security to indemnify a particular person, but an equitable lien arises in favor of the ultimate holder of the debt as upon a contract made for his benefit, even though the holder of the debt at the time was ignorant of the security; and so long as the security can be traced the trust is binding upon any subsequent holder of it, having notice of the trust (Rice v. Dewey, 13 Gray, 47; Eastman v. Foster, 8 Met. 19); and the consent of the holder to its surrender will not be effectual (Young v. Miller 6 Gray 154; Gordon v. Mulhare, 13 Wis. 22); nor will the holder of the debt acquired upon maturity be affected by equities in respect to the security, arising between the original parties (Carpenter v. Lougan, 16 Wall. 271; Judge v. Vogel 38 Mich. 568; Burhans v. Hutcheson, 13 Kans. 625; Jackson v. Willard, 4 John 41); and the right to sub-

ject the debt to the security does not depend upon his being damnified. Colt v. Barnes, 64 Ala. 108.

Whether the security will be thus regarded as accessory to the debt, or merely to indemnify some individual bound for the debt, will depend upon the language of the contract.

3. But if the security is limited to indemnify some particular person in respect of his liability, it will not be regarded as a trust created to secure the debt, and when the person for whose indemnity the security was given has been been discharged from liability, the trust expires and the security must be returned (Bank of Virginia v. Boisseau, 12 Leigh, 387). Other creditors have no right to the security, and he may surrender or release it, and they will have no right to have the release annulled. St. Louis Building etc. v. Clark 36 Mo. 601; O'Hara v. Baum, 88 Pa. St. 114; Jones v. Quinniptack Bk., 29 Conn. 25; Horner v. Savings Bk., 7 Conn. 478, 484. But the equities which exist in favor of the holder of the security, or of the principal by whom the trust was created may enure to the creditor. Thus it is held that a creditor is entitled to the benefit of all pledges or securities given by the principal to his surety for his indemnity. 1 Eq. Cas. Abr. 93 pl. 5. But this is limited to those securities which were placed in the hands of the surety by the principal for his indemnity against the particular debt sought to be charged by the creditor against them; and the creditor in such case works out his right through the equities of the original parties; otherwise he would have no right superior to that of a general creditor; for he does not stand upon the right of subrogation, nor can he show any contract right to the security; this was the rule laid down by Lord Eldon in the case of *ex parte* Waring 19 Ves. 345; it is something like the equity which is worked out in favor of firm creditor by and though the partners (Vide *ex parte* Ruffin 6 Ves. 119) "The principle of *ex parte* Waring," observes L. J. James, "applies where there are equities to adjust between the parties who become insolvent, and the adjustment of which equities, by a piece of good luck, so far as a third party is concerned, operates for the benefit of a third party." Vaughan v. Haliday, L. R. 9 Ch. Ap. 561; see Jones v. Quinnipiack, Bk. 29 Conn. 25; Colt v. Barnes, 64 Ala. 108; St. Louis Building etc. v. Clark, 36 Mo. 601; Hartford etc. v. First National Bank, 46 Conn. 573; *ex parte* Rushforth 10 Ves. 409. It may be observed in conclusion that in order to give the right in any case to a specific security, the security must have been so specially directed or appropriated: Levi & Co's Case, L. R. 7 Eq. Cas. 449.

St. Louis, Mo. GIDEON D. BANTZ.

WEEKLY DIGEST OF RECENT CASES.

1. ASSAULT. [*What Constitutes.*] *Attempt to do Present Harm.*—Where a person makes an attempt to do a harm to another, it is an assault, although he does not touch her person. [In support of this doctrine see Morton v. Shoppee, 3 Car. & P. 373; Stephen v. Myers, 4 Car. & P. 349; Tuberville v. Savage, 1 Mod. 3; Com. v. White, 110 Mass. 408; State v. Davis, 1 Ired. 105; Smith v. State, 7 Humph. 43; State v. Rollins, 8 N. H. 550; State v. Benedict, 11 Vt. 636; Bird v. Jones, 7 Q. B. 742; Bloomer v. State, 3 Sneed, 66; State v. Taylor, 3 Sneed, 662.] *Com. v. Hogenlack*, 1 New Eng. Repr. 105.

2. CORPORATION. [*Meetings of Trustees.*] *President may Act as Secretary.*—The person who presides over a meeting of the board of trustees of a corporation may also be the clerk of the meeting. *Budd v. Wallawalla etc. Co.*, S. C. Wash. T., July 24, 1885; 7 Pac. Repr. 896.

3. ——— ———. *Upon What Notice Called.*—To be valid, a meeting of the board of trustees must be a stated meeting, or one regularly and properly called; and when the meeting is not a stated meeting, it is not essential that proof or recital of notice appear on the face of the record of the proceedings; it may be shown *aliunde*. [Citing Bank of U. S. v. Dandridge, 12 Wheat. 64; Railway Co. v. McCarthy, 96 U. S. 258; Gelpcke v. City of Dubuque, 1 Wall. 221. *Ibid.*

4. ———. [*Directors—Contracts.*] *Power of a Director to Contract with the Corporation.*—In the absence of any statute prohibiting, a trustee may legally contract with the corporation through its proper officers, if he does so openly and fairly. [In giving the opinion of the court on this point it is said by Greene, C. J.: "As to these main questions the authorities are somewhat divergent, but the weight of them and the better reason accord with our views. Most of the decisions that seem to favor a contrary doctrine are controlled by statutory provisions, or are based upon circumstances displaying actual or constructive fraud. Enough books to show the reasoning and attitude of the courts in the premises are cited when we name the following: Ang. & A. Corp. (8th Ed.) § 233 and citations; Rolling Stock Co. v. Railroad Co., 34 Ohio St. 450; Hallam v. Indianola H. Co., 56 Iowa, 178; s. c., 9 N. W. Rep. 111; Neall v. Hill, 16 Cal. 146; Smith v. Skeary, 47 Conn. 47; Duncomb v. New York, H. & N. R. Co., 88 N. Y. 1; Leavitt v. Oxford & G. S. Min. Co., 1 Pac. Rep. 356; Sutter St. R. Co. v. Baum, 4 Pac. Rep. 916; Twin-Lick O. Co. v. Marbury, 91 U. S. 587; Pneumatic Gas Co. v. Berry, 113 U. S. 322; s. c., 5 Sup. Ct. Rep. 525.] *Ibid.*

5. CORPORATION. [*Stockholders.*] *Creditors Proceeding against Stockholders Need not First Try to Induce the Corporation to Make a Call.*—[In support of this proposition Belknap, C. J., in giving the opinion of the court, reasons thus: "The first objection which we are asked to consider is that the complaint does not state a case entitling the plaintiff to sue. It is urged that subscriptions to the capital stock of the corporation are payable upon the call of the company, and that a creditor, to maintain a suit of this nature, must, before instituting it, make an effort to induce the corporation to make the call, and that no proper effort in this behalf has been made. In support of this view we are referred to a number of cases holding that a stockholder or creditor of a corporation may, under certain circumstances, and to prevent a failure of justice, institute and control a suit in his own name involving the rights of the corporation, if it has refused to take action. In this class of cases the right of action is primarily in the corporation, and it is entitled to the fruits of the litigation; but the stockholder or creditor is allowed to sue in order to protect the rights or property in which he has an interest. The principle involved

in these cases has no application to cases of the nature of the one at the bar, which is of the nature of a creditors' bill, brought by a plaintiff entitled in his own right to the relief which the judgment affords."] *Thompson v. Reno Savings' Bank*, S. C. Nev., Sept. 18, 1885; 7 Pac. Repr. 870.

6. ——.——. *Statute of Limitations does not run until Adverse Action taken.*—Where subscriptions to the capital stock of a corporation are payable upon call, and when no call is made, the obligation is a subsisting one, and the statute of limitations is not available as a defense unless set in motion by some adverse action. [In the opinion of the court on this point Belknap, C. J., says: "Appellant's subscription to the stock was made in the month of April, 1876, and it is said that a recovery thereon was barred within four years thereafter. The statutes relating to corporations provide that the by-laws may prescribe the times, manner, and amounts in which payments of subscriptions to the capital stock may be made. If the by-laws make no provision of this nature, and none was made by the by-laws of the bank, the trustees have power to require payment of such installments as they may deem proper. Comp. Laws, § 3,398. The trustees of the bank, being subscribers to its capital stock, availed themselves of the privilege afforded by the statute, and made no call, except 30 per cent. of the amount subscribed at the commencement of business operations. No action has ever been taken by them to recover any portion of the remaining 70 per cent. of the subscribed capital. This unpaid amount was a part of the capital of the bank allowed to remain in reserve in the hands of the stockholders, but subject to call when needed. It was a continuing liability of the subscribers, which neither the indulgence of the trustees nor mere lapse of time could defeat. The statute of limitations is not available as a defense, because it has not been set in motion by any adverse action, such as a call by the corporation upon appellant to pay his subscription. If the insolvency of the corporation set the statute in motion, sufficient time had not elapsed when this suit was commenced to bar a recovery. Allibone v. Hager, 46 Pa. St. 48; Curry v. Woodward, 53 Ala. 371; Harmon v. Page, 62 Cal. 448; Thomp. Liab. Stockh. §§ 290, 291."]—*Ibid.*

7. Corporations, Municipal. [*Ultra Vires*]. *Not bound by the Act of Agent in Excess of his Authority.*—A governmental corporation is not estopped by the act of an officer, in cases where the act is beyond the scope of his authority. ["Public Corporations," says Elliott, J., "stand on an essentially different ground from private ones, and the rules which apply to the one class do not apply to the other, in cases where the doctrine of *ultra vires* is invoked. Drift-wood. etc., v. Board, 72 Ind. 226; Cummins v. City of Seymour, 79 Ind. 491, see p. 497."] *Union School Tp. v. First Nat. Bank*, S. C. Ind. Sept. 15, 1885.

8. ——. ——. *Trustee of School Corporation no Power to borrow Money.*—Where a school trustee has funds of the corporation in his hands, he cannot borrow money to pay expenses of the corporation. *Ibid.*

9. ——. ——. *Persons dealing with Such Officer bound to take Notice of his Powers.*—The trustee of a school corporation is a special agent of limited powers, and it is incumbent upon those who deal with him to ascertain whether the trustee is acting within his authority. [Citing City of Valparaiso v Gardner, 97 Ind. 1; Strosser v. City of Fort Wayne, 100 Ind. 443, see p. 449; Axt. v. Jackson School Tp. 90 Ind. 101; Reeve School Tp. v. Dodson, 98 Ind. 497.] *Ibid.*

10. Distribution. [*New Hampshire Statute.*] *When Children of Deceased Brothers and Sisters Share per capita.*—By the statute of New Hampshire it is provided: "The personal estate of a person dying intestate is distributed: 1. To the widow, the share by law prescribed; the residue to the children of the deceased and the legal representatives of such of them as are dead. 2. If there be no issue, to the father, if he is living. 3. If there be no issue or father, in equal shares to the mother and to the brothers and sisters or their representatives. 4. To the next of kin in equal shares." Gen. Laws N. H., chap. 203, §§ 1, 6. Under this statute if a person die intestate leaving none nearer of kin to him, the children of deceased brothers and sisters share *per capita*. [In so holding, the court, speaking through Smith, J., say: The words "next of kin" in the statute are words of purchase,—denoting the persons who are to take the estate,—and not words of limitation. The heirs, therefore, do not take by representation. Being all next of kin, they take as such, and in equal shares, *per capita*. Snow v. Snow, 111 Mass. 389. In Hill v. Nye, 17 Hun. 457, it was held that the maternal grandmother and paternal grandparents, being the next of kin, took the estate of the intestate *per capita*. Knapp v. Windsor, 6 Cush. 156 is a similar case. The next of kin were the paternal grandmother and the maternal grandparents of the intestate. It was held that each was entitled to a distributive share (one-third) in the estate. Shaw, Ch. J., said; 'It is a plain rule of the law that those who take property as a class of persons described, when there is nothing to distinguish their respective rights, take in equal shares. * * * The rule of representation applies only from necessity, or where there are lineal heirs in different degrees, as children and the children of a deceased child, or brothers and sisters and the children of a deceased brother or sister.' In Jackson v. Thurman, 6 Johns. 322, the question was whether B. and C., children of the intestate's deceased sister, and D., son of the intestate's deceased brother, took *per stirpes*, or *per capita*. It was decided that they took *per stirpes*, because the statute made them inherit such share as their parents respectively would have inherited, if living; but the court said this was carrying the doctrine of inheritance *per stirpes* further than it was carried in the case of lineal descent and further than it was carried in the novel of Justinian (118) from which the New York statute was copied. The rule is nowhere better stated than by Chancellor Kent—2 Kent Com. 425: 'It is the doctrine under the statute of distributions, that the claimants take *per stirpes* only when they stand in unequal degrees, or claim by representation, and then the doctrine of representation is necessary. But when all stand in equal degree as three brothers, three grandchildren, the nephews, &c., they take *per capita*, or each an equal share; because in this case, representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree; and it would be contrary to the spirit and policy of the statute which aimed at a just and equal distribution.' See also Parker. v. Parker, 61 N. H. 65, and authorities cited; 2 Wms. Exr's. 6th ed., 1513; 3 Redf. Wills, 425.] *Nichols v. Shepard*, S. C. N. H., July 31, 1885; 1 Eastern Repr. 676.

11. EVIDENCE. [*Insanity—Will.*] *Evidence of Testator's Mental Condition Subsequent to the Execution of the Will when Admissible.*—In an action involving the question of the validity of a will, where insanity of a testator is alleged, and the disease causing his insanity was a progressive one, a witness may testify as to the condition of testator's mind at a period prior to the execution of the will. [Citing People v. Sanford, 43 Cal. 33; Estate of Fromes, 54 Cal. 509.] *Estate of Dalrymple*, S. C. Cal., Sept. 18, 1885; 7 Pac. Repr. 906.

12. JUDGMENTS. [*Fraud.*] *When Set Aside in Equity for Fraud.*—Judgments will not be set aside on the ground of fraud, unless such fraud was practiced in the very act of obtaining the judgment, without any default of the party against whom the judgment was rendered, or of his counsel. [In the opinion of the court by Myrick, J., it is said: "Where a judgment is attacked and sought to be set aside for fraud, the 'fraud must have been practiced in the very act of obtaining the judgment, or else it will be concluded by the judgment at law, where fraud is equally a defense as in equity.' 2 Story Eq. Jur. 1575. 'The rule of the best considered and more recent cases upon the subject, is that the party must have failed in obtaining redress in the suit at law, by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel.' 2 Story Eq. Jur. 1574, note; French v. Garner, 7 Port. (Ala.) 549; Ede v. Hazen, 61 Cal. 360; Weir v. Vail, 4 Pac. Rep. 422; U. S. v. Throckmorton, 98 U. S. 61.] *Zellerbach v. Allenberg*, S. C. Cal., Aug. 17, 1885; 7 Pac. Repr. 908.

13. JURISDICTION. [*Probate Court.*] *Judgment of Distributing Exempt Property of Widow is Void.*—A decree of the probate court distributing the estate of a deceased husband is void so far as it includes money derived from the sale of the homestead right, or personal property, owned by his widow, whose death was subsequent to that of her husband, and whose estate was unadministered; and an action cannot be sustained against the administrator and his surety on the probate bond by an heir to recover his portion of his mother's estate so included in the decree distributing his father's estate. [In the opinion of the court by Veazey, J., it is said: "The probate court does not proceed according to the course of the common law; but has a special and limited jurisdiction given by statute; and if it appear on the face of the proceedings that it has proceeded in a manner prohibited, or not authorized by law, its orders and decrees are absolutely void, and may be treated as a nullity. Hendrick v. Cleveland, 2 Vt. 329; Smith v. Rice, 11 Mass. 507; Hunt v. Hapgood, 4 id. 117; Sumner v. Parker, 7 id. 79."] *Probate Court v. Winch*, S. C. Vt., Oct. 1, 1884; 1 Eastern Repr. 642.

14. PARTNERSHIP. [*Receiver.*] *When Lien not Obtainable on Funds of Insolvent Partnership after Appointment of Receiver.*—It is not possible to obtain a lien on assets of insolvent partnership by taking judgment and filing creditors' bill on claim after such assets have passed into hands of a receiver for payment of debts, and the debtors have been called to go before him and prove up their claims. *Quære*, whether a right to priority can be acquired by taking judgment before creditors are called. But where a receiver is appointed simply to hold the property or funds pending the adjustment of equities, the creditors are not bound to wait until such equities are adjusted, but may proceed to take judgments and fix priority of liens in case the bill should be withdrawn and the receiver dismissed. [The court examined the following cases: Waring v. Robinson, 1 Hoff. Ch. 524; Holmes v. McDowell, 15 Hun, 585; s. c., aff'd., 76 N. Y. 596; Law v. Ford, 2 Paige, 310; Van Alstyne v. Cook, 25 N. Y. 489; Manard v. Bond, 67 Mo. 315; Ross v. Titsworth, 37 N. J. Eq. 333; Ellicott v. U. S. Ins. Co., 7 Gill, 307; Adams v. Hackett, 7 Cal. 187; Adams v. Wood, 8 Cal. 152, and 9 Cal. 24.] *Jackson v. Lahee*, S. C. Ill., June 13, 1885; 2 N. E. Repr. 172.

15. PRIVATE INTERNATIONAL LAW. [*Foreign Chattel Mortgage.*]—*Follows the Property when Removed to Another State.*—A chattel mortgage executed in New York, and valid there, is valid here, when the owner comes into Vermont with the property. [In giving the opinion of the court, Powers, J., said: "In New York, as here, a chattel mortgage duly executed and registered vests the title in the mortgagee, subject to the mortgagor's right of redemption at the time fixed in the condition. Failing to redeem, the mortgagor's right is lost at law, and the mortgagee gets an absolute title. If the creditors of the mortgagor attach the chattel mortgaged, or subsequent mortgages of it be executed, such creditors and mortgagees take only the interest of the mortgagor in the chattel and hold it exposed to forfeiture for breach of condition by the mortgagor. After breach of condition the mortgagor has no attachable interest in the chattel. Champlain v. Johnson, 39 Barb. 608; Judson v. Easton, 58 N. Y. 664. This court held in Jones v. Taylor, 30 Vt. 42, that a chattel mortgage executed in New York and valid there, without a change of possession, would protect the property here against attachment, though found here in the possession of the mortgagor; and the court overruled the earlier case of Skiff v. Solace, 23 Vt. 279, holding a contrary doctrine. The same doctrine was reaffirmed in Cobb v. Buswell, 37 Vt. 337, where the property mortgaged was brought to Vermont from New Hampshire by the consent of the mortgagee. In some States a different rule prevails, but the law in this State is firmly established by the cases cited." *Norris v. Sowles*, S. C. Vt., Jan., 1885; 1 Eastern Repr. 666.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES ANSWERED.

Query No. 25. [21 C. L. J. 370.]—Under the laws of Alabama, stock in an incorporated company is liable to levy and sale under execution. The execution is a lien from the levy. A., having recovered judgment against B., caused an execution to be levied on certain stock owned by B. in an incorporated company, pursuant to the statute, on the —— day of February, 1885. On the —— day of ——, 1885, the company declared a dividend on the stock. On the —— day of May, 1885, the sheriff sold the stock, and the same was duly transferred on the books of the company to the purchaser. Who is entitled to the dividend declared after the execution became a lien, and before the sale—the defendant, or the purchaser?

Answer.—The service of an attachment is the seizure of the thing by the officer of the law, so that the judgment and sale relate back to the levy, and the purchaser's title takes effect from the date of the levy. Loughridge v. Bowland, 52 Miss. 558; Taylor v. Lowenstein, 50 Miss. 281. Where an enrolled judgment is by law a lien on the defendant's property, the title to the execution purchaser relates back to the date of the judgment. Gould v. Luckett, 47 Miss. 114; Adams v. Harris, 47 Miss. 156; Walton v. Hargroves, 42 Miss. 26. As an execution becomes a lien on personal property at the date of its levy, where the judgment is not a lien by statute (see Freeman on Executions, secs. 195, *et seq.*), the title of the execution purchaser must relate back to the time of the levy. Hence, a dividend declared on stock in a corporation after the levy of an execution on the shares and before the sale, should go to the execution purchaser. J. D. G.

Vicksburg, Miss.

Query No. 26. [21 C. L. J. 371.]—LETTING PUBLIC CONTRACT TO OTHER THAN LOWEST BIDDER.—The town of —— advertise for sealed proposals for building a school-house "according to plans and specifications which may be seen at town hall upon application to janitor. All proposals to be addressed to H——, chairman of Committee on Buildings," etc." This committee were elected at a town meeting, and authority conferred on them to make a contract for the erection of a school-house. This committee in their advertisement did not reserve the right to reject any and all bids. Three bids were made in conformity to the advertisement. The contract was awarded to the highest bidder, who also was a member of the committee, but resigned for the purpose of bidding on the contract. The lowest bidder is responsible and capable. Can the lowest bidder maintain an action for damage against the town?

Answer. The lowest bidder cannot maintain an action against the town. The functions of the committee were in large measure judicial, involving the exercise of discretion not subject to control by the courts. In the absence of some legislative requirement the contract need not be let to the lowest bidder. His bid vests no enforceable right in him, until award is made to him. Read text and cases cited. High on Extraordinary Remedies, secs. 91 to 94, inclusive (2nd edition). Even if the charter of the town required contracts to be awarded to the lowest bidder, the town would not be liable for a violation of the provision, but could plead the illegality of the action of the committee in defense. Dillon on Municipal Corporations, 3d edition, sec. 466. Whether, in an aggravated case, the committee could be controlled by *mandamus*, see authority first cited. H. M. WILTSE.

Chattanooga, Tenn.

Query No. 27. [21 C. L. J. 371.] EFFECT OF WITHDRAWAL OF ATTORNEY.—Will the withdrawal of an attorney from a pending cause, by leave of the court obtained at his request, but in the absence and without the knowledge of his client, have the effect also to withdraw the appearance and pleadings of his client, on file, and subject him to a judgment by default?

Answer.—A citation of cases is not necessary in answering this query. *Perspicua vera non sunt probanda.* A consideration of the relation of attorney and client—agent and principal—solves the question. The acts of an attorney are the acts of his client, when performed within the scope of his employment. Where an attorney has filed or served an appearance and pleading, the client and not the attorney has appeared and plead. He is in the action by virtue of his own act done through the medium of an agent—the attorney. The application of the attorney, to the court, to be relieved of his trust is purely a personal matter, and he but seeks to change his relation to his principal, and not that of his principal to third parties. Reasoning from the principle of the law of agency, before stated, the withdrawal of an attorney from an action pending, would no more subject his client to a judgment by default, than would that of an agent, in a commercial transaction, rescind the contract or overtures for one, or give either party an advantage over the other. The *status* of the client will not be affected by the withdrawal. He can substitute another attorney and proceed in the action. J. T. WALSH.

New York.

JETSAM AND FLOTSAM.

THE ART OF QUESTIONING.—Not a few lawyers, who have the ear of the court and jury, fail in the examination of witnesses. A lawyer who abuses a stupid witness, or browbeats an obstinate one, is not doing that which he is paid to do—that is, to draw out the truth.

In a trial for murder, the result of a broil, the principal witness for the prosecution swore strongly against the prisoner. O'Connell, who defended the prisoner, cross-examined the witness in this persuasive style:

"Were you not after taking a drop when this happened?"

"Sartainly, I took a drop that day."

"How much might the drop have been—a glass?"

"Yes, I drank a glass of spirits, surely."

"Maybe, if you remember, you took a second?"

"Why, I suppose I took as good as two."

"Come, my good man, did you not take as good as three that day?"

"I don't know, faix. Maybe I did."

"Now, my man, by virtue of your solemn oath, did you not drink a pint of whiskey before you saw these men a-fighting?"

"I took my share of it."

"Was it not all but the pewter?"

"It was, sir."

The jury discredited the witness's testimony and acquitted the prisoner, whose life was saved because O'Connell was a master of the art of questioning.

Lord Chief-Justice Coleridge, of England, when at the bar, was noted for his skill as a cross-examiner. He never bullied or flustered his witness, and he got out of even the most reticent what he wanted.

The witness, if a rough woman, was addressed as if she were a lady; if a rough man, as though he were a gentleman. The lawyer's suavity was so fascinating that in a few minutes the witness felt that he, as the counsel's friend, was giving him just the information he needed to extricate himself from a difficulty. Coleridge's manner said,—

"My good friend, won't you help me? I really am perplexed as to the facts in this case, and I want your assistance to get at the truth. Let me ask you a few questions."

When these questions had been answered in the exact way in which the questioner had designed they should be, the case was won. The high art of the lawyer's questions had won it, before he had uttered a word to the jury.—*Youth's Companion.*